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ARTICLES

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CHILD NEGLECT IN THE MILITARY COMMUNITY: ARE WE NEGLECTING THE CHILD?

MAJOR LISA M. SCHENCK*

Ian Thomas Alexander
Born April 20, 1980—Died January 7, 1981

[Ian Alexander died as] a result of inadequate nourishment and medical attention, according to medical experts. . . . The child was emaciated . . . his body was positively frigid. Among other things, the physicians suspected that he had been placed in a refrigerator. . . . [The accused1 and his wife would leave the baby unattended at home four or five times a week while they went to the base to 'socialize.'. . . [T]hey left Ian alone in the apartment while they transacted certain business and "socialized" until about 2300 hours that evening . . . . [P]athologists estimated that Ian had been dead for 7 hours at that time and it was not for another 11 hours that the death was discovered.—United States v. Alexander1

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1 18 M.J. 84, 85-86 (C.M.A. 1984).

Absent a statute or a punitive regulatory provision this court declines to enter the morass which would be created by holding that child neglect, standing alone, constitutes an offense under Article 134, UCMJ.[2] *—1991 opinion of the United States Army Court of Criminal Appeals (ACCA)*[3] *on reversing a special court-martial conviction for child neglect in violation of Article* ***134,*** *Uniform Code of Military Justice (UCMJ).*[4]

I. Introduction

Had someone discovered Ian Thomas Alexander before he died, his parents' conduct may have been defined as child neglect. Although experts differ about its definition, the term "child neglect" usually encompasses "a parent's or other caretaker's failure to provide basic physical health care, supervision, nutrition, personal hygiene, emotional nurturing, education, or safe housing. It also includes child abandonment or expulsion, and custody-related forms of inattention to the child's needs."[5]

Unfortunately, in most cases of criminal child neglect in the military, convictions only come with the death of the victim. Numerous court decisions have upheld convictions for neglectful conduct that results in unpremeditated murder;[6] involuntary manslaughter;[7] and negligent homicides for extreme child neglect

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[2]United States v. Wallace, 33 M.J. 561, 564 (A.C.M.R. 1991) (footnote omitted). At trial, the military judge found the accused guilty by exceptions and substitutions of child neglect, but the United States Court of Military Appeals (COMA) overturned the conviction. ***See infra*** note 135 (specification alleging that the accused violated his duties of care to his children, then seven, six, and one years of age, by locking them in government quarters and not providing responsible care).

[3]On October 5, 1994, the President signed into law Senate Bill 2182, Defense Authorization Act for Fiscal Year 1995, ***see*** Nat'l Def. Auth. Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663, 2831, (to be codified at 10 U.S.C. § 866), which redesignated the United States Courts of Military Review for each separate service a United States Court of Criminal Appeals and redesignated the United States Court of Military Appeals as the United States Court of Appeals for the Armed Forces. This article will refer to the courts by the names applicable at the time that the decisions were rendered.

[4]UCMJ art. 134 (1982).

[5]James M. Gaudin Jr., ***Effective Intervention*** *with* ***Neglectful Families, 20*** CRIM. JUST. & BEHAV. 66, 67 (1993). Throughout this article, the term "child neglect" generally refers to emotional neglect, abandonment, and the failure to provide food, shelter, clothing, medical care, supervision, or education.

[6]UCMJ art. 118(2) (1984).

[7]*Id.* art. 119.

[8]*Id.* art. 134.

resulting in a fatality.[9] As the COMA has indicated, "The notion that parents can be criminally responsible for murdering their children by failing to provide the necessities of life is well established."[10]

When a child's death results from abuse, prosecutors and commanders may choose from many punitive options; the same is true if a child is injured from physical abuse. However, if authorities discover neglect of a child ***prior*** to death, absent evidence of actual physical abuse, punitive options are limited and may vary from jurisdiction to jurisdiction. In child neglect cases, military prosecutors can charge the violation of existing provisions in the UCMJ, state statutes assimilated into the UCMJ through the Federal Assimilative Crimes Act,[11] or punitive installation regulations. However, because Ian Alexander's death occurred off post in Germany, even if authorities had discovered the neglect prior to his death, no state criminal provision would have been available for assimilation. Furthermore, no punitive regulation existed on which the government could base a charge of criminal child neglect against a military parent.[12]

Furthermore, based on recent conflicting decisions from the various service courts of criminal appeals, Army trial counsel may be unable to successfully prosecute child neglect under Article 134, UCMJ—either clause one (conduct prejudicial to the good order and discipline of the armed forces) or clause two (conduct of a nature to bring discredit upon the armed forces)—while Air Force trial counsel retain this option.[13] Army trial counsel must resort to other punitive articles and may charge child neglect only if there is evidence of physical abuse or if there is a state-provided criminal statute for child neglect.

The military's primary response to the problem of child

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[9]*See* United States v. Robertson, 33 M.J. 832 (A.C.M.R. 1991); United States v. McGhee, 33 M.J. 763 (A.C.M.R. 1991); United States v. Perez, 15 M.J. 585 (A.C.M.R. 1983); United States v. Valdez, 40 M.J. 491 (C.M.A. 1994). Some of these cases involve parents who failed to take action when they knew that a caretaker was abusing their child, but continued to place the child in the hands of the abusing caretaker.

[10]*Valdez,* 40 M.J. at 495.

[11]18 U.S.C.A. § 13 (West 1995).

[12]Additionally, the mother of the victim "was a German national, and the crimes were committed on German soil." Valdez, 40 M.J. at 496 n.2. The COMA added, "This Court has no cognizance of what, if any, proceedings were instituted or results obtained against Christina Valdez by appropriate civil authorities." Id.

[13]UCMJ art. 134 (1984). ***Compare*** United States v. Wallace, 33 M.J. 561 (A.C.M.R. 1991) (dismissing a clause 1, Article 134 specification for child neglect); *with* United States v. Foreman, ACM 28008 (A.F.C.M.R. 25 May 1990) (finding that the accused failed to admit to criminal child neglect in the providence inquiry, but specifically holding that child neglect could be charged under Article 134).

neglect has been the Department of Defense (DOD) Family Advocacy Program and the individual services' family advocacy programs that implement the DOD program. However, family advocacy programs do not focus on the punitive options available to commanders and prosecutors. Family advocacy programs generally do not provide or contemplate punitive measures against perpetrators of child neglect. For example, although the goal of the DOD program is to protect the child,[14] it is limited in large part to education, rehabilitation, treatment, and monitoring of parents who commit offenses against the child.[15] In contrast, commanders may have different objectives and problems that differ from, and are in addition to, those of the family advocacy program when dealing with crimes soldiers commit against their children.

Problems that occur at home can affect military members, their families, and the readiness of the units. With increased deployments, dual military couples, and increased child care costs, child neglect is likely to increase. Service members, commanders, and prosecutors need established standards for parental responsibilities. Established standards will lessen the likelihood of disparate treatment of offenders while providing notice to the military community of parental responsibilities.

This article examines the military's inadequate criminal response to the problem of child neglect, and explores available punitive options against military service members and dependent spouses who commit criminal child neglect. The solution is to provide a uniform standard for parental responsibilities for the armed services and clear punitive options for commanders. All parents in the military community will receive adequate, consistent guidance, and criminal liability for parental responsibilities will not vary from installation to installation.

This article begins by defining criminal child neglect and reviewing society and the military's delayed response to the problem. The military has responded reluctantly to child neglect through family advocacy programs and "administrative measures."

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[14] DEP'T OF DEFENSE, DIRECTIVE 6400.1, FAMILY ADVOCACY PROGRAM, encl. 2, para. 5 (June 23, 1992) [hereinafter DOD Dir. 6400.11. Specifically, the family advocacy program is "designed to prevent and intervene in cases of family distress, and to promote a healthy family life." *Id.* These are not the same reasons that commanders become involved in family problems.

[15] *Id.* "Military Family Advocacy Programs within the DOD are designed to prevent, identify, report, intervene, and treat all aspects of child abuse and neglect and spouse abuse." Dep't of Defense, Fact Sheet, subject: DOD Family Advocacy Program (1994) [hereinafter DOD Fact Sheet]. The DOD defines the family advocacy program as "[a] program designed to address prevention, identification, evaluation, treatment, rehabilitation, follow up, and reporting of family violence." DOD DIR. 6400.1, *supra* note 14, encl 2, para. 5.

However, this combined response is incomplete and inconsistent. Furthermore, family advocacy programs and administrative measures cause difficulties in areas of exclusive jurisdiction and fail overseas. Using the results of a survey of army judge advocates as support, this article demonstrates how many installations have promulgated regulations that vary widely from location to location and define parental responsibilities differently.

Child neglect is an identifiable, harmful, and significant problem. Intervention is warranted and overrides unwarranted constitutional concerns about interfering with the family unit. This article illustrates how states overcome constitutional concerns and define criminal child neglect. A review of these state criminal neglect statutes reveals them to be inconsistent and incomplete.

Many possible methods to provide the military community uniform standards for parental responsibilities exist. This article addresses the following alternatives: a new punitive article for the UCMJ; an additional criminal provision for Title 18; and executive branch initiatives providing punitive options. After recommending a solution, this article illustrates possible ways that the military can use criminal sanctions and how the military community will benefit. Some action is better than none; by providing any uniform standards to the uniformed services, the DOD will improve the present situation.

11. Defining Child Neglect

Child *abuse* consistently steals public attention away from child ***neglect.*** This can partially be explained by the readily apparent wrongfulness of child abuse and the difficulty in defining child neglect. Deciding when child neglect becomes criminal is not easy. In the past, society has tended to combine child abuse and neglect in one category. However, the terms are not the same. "Abuse usually involves intentional acts of the parents and generally consists of physical, mental, or sexual abuse. Neglect on the other hand, consists of omissions or failure to act or perform a duty that can be performed."[16]

The problem of clearly defining the term "child neglect" pervades all contexts, "whether it be political debate, legislation, agency intervention, research, or community perceptions."[17]

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[16]Peter J. McGovern, *Redefining Neglect: An American Perspective, 7 AM. J.* FAM. **L. 207, 212 (1993).**

[17]Isabel Wolock & Bernard Horowitz, *Child Maltreatment as a Social Problem: The Neglect of Neglect,* 54(4) *AM.* **J. ORTHOPSYCHIATRY 530, 531 (1984).**

Moreover, the definition of child neglect depends on who is using the term and in what context. "Child neglect is a term that encompasses a broad range of conditions for which there is little consistency of definition among practitioners, policymakers, or researchers."[18]

A. *Civil Versus Criminal Child Neglect: Different Goals Require Different Definitions*

State legislatures have codified definitions of child neglect in both civil and criminal statutes. Civil statutes are protective laws subjecting parents to actions such as permanent loss of custody of the child, while penal laws subject them to criminal sanctions.[19]

Depending on the goals of the professionals and focus of the statutes involved, the definitions differ. Child protection agencies and lawmakers, appear to focus on parental omissions in care while health care professionals focus on the effects on the child.[20] However, all parties concerned struggle to define what constitutes basic, minimal, or adequate care of children.[21] Within that dilemma lies the conflict between the seriousness and potential harm to the child and parental intent or culpability, versus community conditions for which parents are not responsible.22 In any case, parental responsibilities, including moral and legal obligations, are acquired with the birth or adoption of a child, or by marriage (i.e., step parents). Like service members, parents have duties that can, and must, be enforced.

In defining child neglect, agencies — such as the National Center on Child Abuse and Neglect (NCCAN)[23]—that focus on pro-

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[18]Gaudin, *supra* note 5, at 67.

[19]INSTITUTE OF JUDICIAL ADMINISTRATION AMERICAN BAR ASSOCIATION JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO ABUSE AND NEGLECT 180 (1981) [hereinafter IJA-ABA STANDARDS]. At the time these standards were written, only 13 jurisdictions had criminal penalties for child neglect and 19 jurisdictions had civil penalties for child neglect. *Id.*

[20]Howard Dubowitz et al., A *Conceptual Definition of Child Neglect,* 20 CRIM. JUST. & BEHAV. 8, 11 (1993).

[21]Gaudin, *supra* note 5, at 67.

[22]*Id.* Societal problems, such as poverty, exacerbate this conflict. As a result, poor parents may he unable to provide a child with the necessities, but may not be *neglecting* a child.

W e e The Child Abuse Prevention, Adoption, and Family Services Act of 1988, Pub. L. No. 100-294, 42 U.S.C. §§ 5105a-5106h & 10413 (1988) (reauthorizing the NCCAN, which was originally established under The Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, U.S.C. §§ 5101-5107 (1982)) The NCCAN is a division of the Administration on Children, Youth and Families, Administration for Children and Families, United States Department of Health and Human Services. The NCCAN is the federal agency tasked with assisting state and local activities and funds the National Resource Center on Child Abuse and Neglect. NAT'L RESOURCE CENTER ON CHILD ABUSE AND NEGLECT, BROCHURE (1994) [hereinafter RESOURCE CENTER BROCHURE].

tective or civil laws use broad, yet recognizable, symptoms and terms. These agencies define child neglect in ways to increase public awareness; educate the public; and assist in prevention, identification, and treatment.[24]

For example, an agency within the NCCAN—the National Resource Center on Child Abuse and Neglect[25]—divides child neglect into four types: (1) physical; (2) educational; (3) emotional; and (4) medical. Physical neglect includes "the refusal of, or extreme delay in seeking necessary health care, child abandonment, inadequate supervision, rejection of a child leading to expulsion from the home, and failing to adequately provide for the child's safety, physical and emotional needs."[26] Educational neglect occurs "when a child is allowed to engage in chronic truancy, is of mandatory school age but not enrolled in school or receiving training, andlor is not receiving needed special educational training."[27] Emotional neglect includes "chronic or extreme spousal abuse in the child's presence, allowing a child to use drugs or alcohol, refusal or failure to provide needed psychological care, constant belittling and withholding of affection."[28] Medical neglect includes "the failure to provide for appropriate health care for a child—although financially able to do so."[29]

Civil and criminal statutes—like the supporting agencies—also define child neglect and parental duties differently.[30] Under civil child neglect statutes, definitions of child neglect determine when, and what type, of government intervention is warranted, and when reporting is required. Civil laws focus on initiating child protection, reporting, and terminating parental rights.[31] In contrast, under criminal statutes, definitions determine when a parent's conduct triggers criminal liability. Civil laws address recurring

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[24] RESOURCE CENTER BROCHURE, *supra* note **23.** Specifically, the Resource Center concentrates on "information dissemination, knowledge building, training, technical assistance, best practices, and networking." *Id.*

[25] *See supra* note **23** (explaining NCCAN and the Resource Center).

[26] Information Sheet, National Resource Center on Child Abuse and Neglect, subject: Child Neglect (June 1994) [hereinafter Resource Center Child Neglect Information Sheet].

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] For both civil and criminal statutes, most agree that children have the right to state protection from their parents' serious physical abuse, but "except for these obvious cases, it is difficult to know what parental behavior should trigger public investigation and intrusion." John E. Coons et al., *Puzzling Over Children's Rights,* 1991 B.Y.U. L. REV. **307,318.**

[31] Civil, like criminal statutes, vary from jurisdiction to jurisdiction and the grounds for neglect are inconsistent. McGovern, *supra* note 16.

parental failures or patterns,[32] while criminal statutes tend to include any egregious omissions in care that harm or endanger.[33] Additionally, civil statutes seek to *protect* children, while criminal codes seek to *punish* offenders who commit egregious deviations from acceptable standards of parental obligations.

Despite these differences, and the overall difficulty in defining child neglect, states have responded to publicized national statistics and the victimization of children with both civil and criminal child neglect statutes.[34]

B. How the Military Defines Child Neglect

The DOD in *DOD Directive 6400.1, Family Advocacy Program,*[35] defines child neglect and abuse in one broad category; the military, like the civilian sector, classifies neglect and abuse simply as forms of maltreatment. Maltreatment includes: "physical injury, sexual maltreatment, emotional maltreatment, deprivation of necessities, or combinations . . . encompass[ing] both acts and omissions."[36]

In *DOD Directive 6400.2,*[37] the DOD further explains the five types of maltreatment described in *DOD Directive 6400.1.* Neglect, i.e., deprivation of necessities, includes abandonment and the failure to provide food, shelter, clothing, medical care, supervision, and education,[38] while emotional maltreatment includes emotional

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[32] *Dubowitz, supra* note 20, at 19.

[33] *Id.* (discussing the varying grounds for child neglect in civil child protection laws).

[34] *See infra* notes 203-07 and notes 324-63 and accompanying text.

[35] DOD DIR. 6400.1, *supra* note 14, encl. 2, para. 5.

[36] *Id.*

[37] DEP'T OF DEFENSE, DIRECTIVE 6400.2, **CHILD AND** SPOUSE ABUSE REPORT, (July 10, 1987) [hereinafter DOD DIR. 6400.21.

[38] According to the DOD, "[n]ecessities deprivation specifically includes the following:

> (1) *Neglecting to Provide Nourishment.* Failure to provide adequate or proper food, which results in a malnourished condition for the victim.
>
> (2) *Neglecting to Prouide Appropriate Shelter.* Failure to provide proper protection against the elements, sanitary living facilities, or a home excluding the victim from the home.
>
> (3) *Neglecting to Provide Clothing.* Failure to provide the victim with adequate or proper clothing suitable for the weather, cleanliness, or custom and culture of the area.
>
> (4) *Neglecting to Prouide Health Care.* Failure to provide for proper medical or dental care that affects adversely or might affect adversely the physical, mental or psychological well-being of the victim.

neglect.[39] The DOD uses these classifications for protective and rehabilitative measures, such as reporting, substantiating maltreatment, and determining treatment.40 Protective and rehabilitative measures require this more detailed definition of child neglect. Because *DOD Directive* 6400.1 provides a general overview of the DOD Family Advocacy Program, only a general definition of maltreatment is required.

Consistent with the DOD definition, the discussion and analy-

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> *(5) Failure to Thrive.* A condition of a child indicated by not meeting developmental milestones for a typical child in the child's position; i.e. low height and weight or developmental retardation. The conditions are secondary to abuse or neglect.
>
> *(6) Lack of Supervision.* Inattention on the part of, or absence of, the caretaker that results in injury to the child or that leaves the child unable to care for him or herself, or the omission to have the child's behavior monitored to avoid the possibility of injuring self or others.
>
> (7) *Educational Neglect.* Allowing for extended or frequent absence from school, neglecting to enroll the child in school, or preventing the child from attending school for other than justified reasons (e.g., illness, inclement weather).
>
> (8) *Abandonment.* The absence of a caretaker when the caretaker does not intend to return or is away from home for an extended period without arranging for a surrogate caretaker.

Id. encl. **2,** para. 13d.

[39]The DOD defines emotional neglect as "[p]assive or passive-aggressive inattention to the victim's emotional needs, nurturing, or psychological well-being." *Id*. encl. 2, para. 13e.

[40]Some of the individual services define neglect in their own regulations. The Army describes neglect as follows:

> Neglect tends to be chronic in nature and involves inattention to the child's minimal needs for nurturance, food, clothing, shelter, medical care, dental care, safety or education. The possibility of neglect should be considered in cases where there has been an unexplained failure to thrive or where there has been an advanced untreated disease. Except as otherwise defined by applicable law, a finding of neglect is usually appropriate in any situation where a child, under the age of 9 is left unattended (or left attended by a child under the age of 12) for an inappropriate period of time. A finding of neglect is also appropriate when a child, regardless of age, is left unattended under circumstances involving potential or actual risk to the child's health or safety. Dental neglect is defined as the failure by a parent to seek treatment for visually untreated dental caries, oral infections or pain, or failure by the parent to follow through with treatment once informed that any of the above conditions exist.

DEP'T OF ARMY, REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM, para. 3-7e (18 Sept. 1987) [hereinafter *AR* 608-181. However, the drafters of this regulatory provision did not design this definition to serve as a criminal standard or punitive provision. The definition was included in the regulation as a uniform guideline for soldiers, commanders, and the family advocacy staff in determining whether a substantiated case of child neglect occurred. The drafters intended to limit subjective judgments while providing notice to the service. Telephone Interview with Colonel Alfred F. Arquilla, Chief of the Legal Assistance Division, Office of The Judge Advocate General (Mar. **27,** 1995).

sis that follow rely on a definition of child neglect that includes emotional neglect, abandonment, and the failure to provide either food, shelter, clothing, medical care, supervision, or education.[41] The term "maltreatment" will indicate both abuse and neglect. This article focuses on egregious child neglect in the areas of abandonment, endangerment, and deprivation, that rises to the level of criminal conduct.[42]

III. The Military Mirrors Society's Neglect of Neglect: A Delay in Interest and Intervention

Compared to child abuse, neglect is relatively difficult to identify and define. Although a common and harmful problem, until recently, the public and lawmakers have not recognized child neglect as a separate problem and have not considered it criminal conduct. Consequently, society and the military have slowly responded to the problem of child neglect, the most common form of child maltreatment.

A. The Lack of National Attention to the Problem of Child Neglect

Initially, state intervention to protect children from abuse and neglect developed from the work of the Society for the Prevention of Cruelty to Children—a private, benevolent, child protection society established in the late 1800s.[43] The society's work, ironically, an outgrowth of humane work for animals, included vigorous lobbying for child protection laws and actively investigating and rescuing neglected children.44 By the turn of the century, child protection laws began to emerge as state legislatures passed statutes authorizing the removal of children from "unwholesome, unsafe or neglectful environments."[45] Legislatures primarily focused on the "obvious" injuries that children suffered at the hands of their parents, such as infanticide, abandonment, and physical abuse.[46]

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[41] *See supra* notes 39 and 40 (identifying the DOD definitions)

[42] This article does not discuss the standard for child neglect stated in civil protective statutes for civil actions, such as termination of parental rights and reporting neglect. For a clarification of criminal abandonment, endangerment, and deprivation, *see infra* notes 324-63 and accompanying text.

[43] Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative,* 75 GEO. L.J. 1745, 1750 n.15 (1987). *See also* Walter Wadlington, *Medical Decision Making for and by Children: Tensions Between Parent, State, and Child,* 2 U. ILL. L. REV. 311, 314 n.20 (1994).

[44] Garrison, *supra* note 43, at 1750 n.15.

[45] John E.B. Myers, *The Legal Response to Child Abuse: In the Best Interest of Children?* 24 U. LOUISVILLE J. FAM. L. 149, 160 (1985-86) (footnote omitted).

[46] *See id.*

Although laws involving juveniles further developed in the twentieth century, it was not until 1950 that the legislation focused on criminal child neglect.[47] Child abuse and neglect were essentially disregarded until the 1960s, when Dr. C. Henry Kempe published his research on the battered child syndrome48 which prompted states to begin enacting child abuse reporting laws.[49] As child abuse became a recognized problem, the public, media, and legislatures began addressing child maltreatment in general. Almost as an afterthought, child neglect gradually gained attention as well.[50]

B. The Military's Delayed Response

While *states* were establishing child abuse reporting laws in the 1960s, the *military* failed to identify and address the problem of child maltreatment. Historically, the military was without a central reporting and tracking agency equivalent to state child welfare agencies.[51] Because of its diverse and widespread locations, the military could not as easily assess the problems of child abuse and neglect.[52] Instead of a military-wide problem, the military maintained a "fragmented perspective," viewing child abuse as only isolated cases.[53]

By the 1970s, the armed services had recognized child maltreatment as a problem, and in 1975 and 1976 the separate military services formed individual service child advocacy programs.54 Finally, in 1981, responding to a General Accounting Office (GAO) recommendation, the DOD formally responded to the problem of child maltreatment and established the DOD Family Advocacy Program.[55] At the DOD's direction, each service established its own family advocacy program.

Today, the individual service programs are responsible for prevention, identification, reporting, treatment, and intervention of

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[47]Eric W. Johnson, *Educational Neglect as a Proper Harm to Warrant a Child Neglect Finding:* In Re B.B., 76 IOWA L. REV. 167, 170 (1990).

[48]C. Henry Kempe et al., *The Battered-Child Syndrome,* 181 JAMA 17 (1962).

[49]Marcia A. Kincanon, Note, *The Child Abuse That Doesn't Count: General and Emotional Neglect,* 22 U. CAL. DAVIS L. REV. 1039, 1046-47 (1989).

[50]Wolock, *supra* note 17, at 535.

[51]Musetta Tia Johnson, Unique Problems in Prosecuting Child Abuse Cases Overseas 4 (1991) (unpublished LL.M. thesis, The Judge Advocate General's School, United States Army).

[52]*See id.*

[53]Thomas J. Hasty III, *Military Child Advocacy Programs: Confronting Child Maltreatment in the Military Community,* 112 MIL. L. REV. 67, 73 (1986).

[54]*Id.* at 74.

[55]*See id.*; Alfred F. Arquilla, *Crime in the Home,* ARMY LAW., Apr. 1988, at 3.

child abuse and neglect and spouse abuse.[56] These programs remain the military's primary answer to child neglect. While the civilian sector has both civil child protection statutes and criminal statutes, the military relies primarily on the family advocacy programs.

IV. The Military's Neglect of Child Neglect

Because the military's response to child neglect relies on family advocacy programs, it is incomplete and ineffective. Family advocacy programs provide rehabilitative and therapeutic options for commanders without expressly providing for punitive options. A lack of federal legislation exacerbates the problem. The armed forces overseas face even more extensive problems. Finally, inconsistent military caselaw seems to further limit the prosecution of criminal child neglect to the use of assimilated state law or punitive regulations.

The military's approach to the problem of child neglect is a combination of the family advocacy program case-by-case management and administrative sanctions. Because the goals of the commander may be extremely different from those of the family advocacy program, the family advocacy program frequently does not address the commander's needs. Punishment for criminal child neglect currently depends on the intervention of civil authorities and the existing state laws.

A. The Armed Forces' Approach to Solving Child Neglect: Family Advocacy Programs — The Military's Child Welfare Agencies?

Family advocacy programs are concerned primarily with preserving the best interests of the victim and the family. Program objectives include identification, diagnosis, treatment, education, counseling, therapy, and rehabilitation.[57] Like civil child protection agencies and civil child neglect statutes for reporting and termination of parental rights, family advocacy program's objectives are directed primarily at protecting the child and sanctity of the home.[58]

By responding to criminal child neglect with treatment,

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[56] DOD Fact Sheet, *supra* note 15.

[57] *Id.*

[58] Different concerns require different responses. For example, the civil action of involuntary terminating parental rights should not turn on a single incident regardless how heinous, but a criminal sanction is designed to punish single episodes repugnant to the community's concept of an orderly society. ***See*** Commonwealth v. Skufca, 321 A.2d 889, 892 (Pa. 1974) (footnote omitted).

retraining, and rehabilitation, these programs fail to demonstrate to the service members or their dependents the acceptable, expected standards of parental responsibilities that create criminal liability. Implementing regulations provide only guidelines. Family advocacy programs and committees provide minimal deterrence, have limited "control" over civilian dependents, cannot punish individuals, and without civilian authority or commander assistance, cannot remove parents or children from the home. Like society's civil statutes, the programs are directed towards protective actions and tend to focus on physical and sexual abuse based on the obvious injuries.

Family advocacy programs currently offer no criminal sanctions.[59] These programs merely provide commanders with recommended rehabilitative programs and have commanders require service members to participate in rehabilitative actions. Commanders and prosecutors often want criminal sanctions as an alternative. Additionally, different goals, perspectives, and preferred solutions often cause disagreements between commanders or prosecutors and family advocacy staff.[60] Many times social workers may view a child maltreatment incident as a manifestation of a dysfunctional family that needs treatment, while a commander or prosecutor may view the same incident as a criminal offense warranting prosecution and punishment.[61]

1. Department of Defense Guidance: What Are the "Uniform" Objectives for the Uniformed Services?—TheDOD directed the individual services to establish family advocacy programs, and gave the services two primary requirements: establish family advocacy case review committees and provide reports.[62] In its guidance, the DOD advocates coordination and cooperation with the child protection and law enforcement agencies in the civilian sector,[63] and grants the services broad discretion in program implementation, based on individual resources and requirements.64

The case review committees have limited power and cannot punish soldiers or civilians. Family advocacy case management committees can indirectly cause a service member to participate in treatment (through a commander's order), but they have limited control over a civilian family member. Therefore, a civilian's partici-

[59]Family advocacy management teams may encourage civilian authorities or commanders to take punitive action. Commanders may take punitive action after the service member disobeys a lawful order.

[60]*See* Arquilla, *supra* note **55,** at **3.**

[61]*Id.*

[62]DOD DIR. 6400.1, *supra* note **14,** para. **E2.**

[63]*Id.*

[64]Hasty, *supra* note **53,** at 76.

pation in rehabilitation effectively is voluntary. The DOD requires that the committees give commanders access to complete case information.[65] Prior to determining the appropriate disposition of any maltreatment incidents, commanders must consider specific factors listed in the DOD Directive.[66]

2. Individual Service Programs-Policies and Objectives—Each military service has established a family advocacy program and promulgated a regulation that implements the program.[67] Overall, the military services agree that child neglect adversely impacts service member and unit readiness, morale, and discipline; and disciplinary or administrative action is warranted in some cases. All services allow disciplinary and administrative sanctions because "[s]ervice members must be held accountable for their behavior. Swift and certain intervention and subsequent disciplinary action are one of the most effective deterrents."[68]

All service programs use a committee case management tracking method. Interdisciplinary teams (case review committees) meet and determine whether a case is substantiated.69 If a case is substantiated, the committee recommends "specific treatment strategies and program intervention to be offered to the family and individuals involved."[70] The team also recommends rehabilitative and treatment responses to the commander.[71] The committee cannot remove a child from the home and must rely on civilian child protec-

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[65] DOD DIR. 6400.1, *supra* note 14, para. F3.

[66] *Id.* para. F3a. Specifically, DOD Directive 6400.1 states that

> [flactorsthat shall be considered in determining dispositions include the following:
>
> a. Military performance and potential for further useful service.
>
> b. Prognosis for treatment as determined by a clinician with expertise in the diagnosis and management of the abuse at issue (child abuse, child neglect, child sexual abuse, and/or spouse abuse).
>
> c. Extent to which the alleged offender accepts responsibility for his or her behavior and expresses a genuine desire for treatment.
>
> d. Other factors considered to be appropriate by the command.

id.

[67] DEP'T OF AIR FORCE, INSTR. 40-301, FAMILY ADVOCACY (22 July 1994) [hereinafter AFI 40-301]; **AR** 608-18, *supra* note 40; Marine Corps Order 1752.3A, Marine Corps Family Advocacy Program (6 Apr. 1987) [hereinafter MCO 1752.3A]; Dep't of Navy, Chief of Naval Operations Instruction No. 1752.2, Family Advocacy Program (6 Mar. 1987) [hereinafter OPNAVINST 1752.2].

[68] OPNAVINST 1752.2, *supra* note 67, para. 3b.

[69] DOD DIR. 6400.1, *supra* note 14, para. F2.

[70] Willard W. Mollerstrom et al., *Family Violence in the* **Air** *Force:* **A** *Look at Offenders and the Role of* ***the*** *Family Advocacy Program,* 157 MIL. MED. 371, 372 (1992).

[71] DOD DIR. 6400.1, *supra* note 14, para. F2.

tion agencies or commanders for such action.[72] Nonetheless, family advocacy programs do not preclude additional criminal sanctions and disciplinary or adverse administrative action.[73]

B. A Federal Legislative Void Adversely Affects the Military's Response to Child Neglect

No matter what action family advocacy committees, commanders, or prosecutors take in child neglect cases, because there are no federal criminal statutes specifically prohibiting child neglect, military services must rely on state statutes. This reliance may produce inconsistent results and disparate treatment. The military's organizational constraints and goals militate against ad hoc disposition of offenses and highlight the need for a uniform standard of parental responsibilities. The problem with the military's reliance on state statutes is exacerbated when the military cannot fall back on civil child neglect statutes in areas of exclusive federal legislative jurisdiction or abroad.

1. Federal Child Neglect Legislation — State and local child protection services traditionally have had the primary responsibility of responding to child abuse and neglect.[74] Since **1935,** with the enactment of the Social Security Act, federal programs have been directed toward stimulating child welfare services and aid to families.[75] In **1974,** the Child Abuse Prevention and Treatment Act[76] created the NCCAN to assist state efforts to implement programs and collect, analyze, and distribute information.[77] The NCCAN also pro-

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[72] AR 608-18, ***supra*** note 40, para. 3-28.

[73] Within applicable regulations, each individual service presents its policies; and some services identify factors that commanders should consider in determining whether disciplinary or administrative sanctions are appropriate. ***See*** AFI 40-301, ***supra*** note 67, ch. 4 (discussing disposition of personnel, without providing specific considerations); AR 608-18, ***supra*** note 40, para. 4-2 (providing policy), para. 4-4 (presenting commander's considerations); MCO 1752.3A, ***supra*** note 67, para. 4 (discussing policy), para. 4f. (providing commander's considerations); OPNAVINST 1752.2, ***supra*** note 67, para. 3 (discussing policy), para. 3b. (providing commander's considerations).

[74] DIANE DEPANFILIS & MARSHA K. SALUS, NCCAN, U.S. DEP'T OF HEALTH & HUM. SERVICES, A COORDINATED RESPONSE TO CHILD ABUSE AND NEGLECT: A BASIC MANUAL 19 (1992) [hereinafter BASIC MANUAL].

[75] *Id.* at 18.

[76] The Child Abuse Prevention and Treatment Act Pub. L. No. 93-247, 42 U.S.C. §§ 5101-5107 (1982).

[77] BASIC MANUAL, ***supra*** note 74, at 18. The National Center on Child Abuse and Neglect was reauthorized in 1988 under Pub. L. No. 100-294, The Child Abuse Prevention, Adoption, and Family Services Act of 1988, 42 U.S.C.§§ 5105a-5106h & 10413. NCCAN, U.S. DEP'T OF HEALTH & HUM. SERVICES, CHILD ABUSE AND NEGLECT: A SHARED COMMUNITY CONCERN 12 (1992) [hereinafter A SHARED COMMUNITY CONCERN].

vides grants and additional funds to states that meet federal guidelines and that initiate certain additional protective programs.[78]

a. The Absence of Federal Offenses—However, federal criminal law does not specifically provide for an offense of child maltreatment. Title 18 of the United States Code prohibits some general crimes, such as murder, arson, and assault.[79] The enumerated offenses generally reflect common law crimes. Consequently, prosecutors cannot apply these statutes when a case involves only child neglect, unless the child dies and the offense falls under the federal homicide statute.[80]

With the Sexual Abuse Act of 1986,[81] Congress provided some criminal sanctions for sexual abuse and exploitation of children.[82] Aside from that legislation, federal prosecutors must base child neglect charges on existing enumerated offenses. Therefore, the only effective criminal sanctions for child neglect remain in the state criminal codes. Consequently, despite the federal "government's good intentions, one major hole in the prosecution of child abuse remains, forcing federal prosecutors to apply poorly suited laws to federal cases."[83]

b. The Federal Assimilative Crimes Act—For crimes occurring on military installations—such as criminal child neglect—military prosecutors may apply three categories of federal criminal law: "criminal laws enforceable only in areas of exclusive or concurrent jurisdiction" (Title 18 enumerated offenses and the assimilated state offenses);[84] criminal laws enforceable in any place under fed-

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[78]BASIC MANUAL, *supra* note 74, at 19. ***See*** *also* A SHARED COMMUNITY CONCERN, *supra* note 77, at 12. The federal government has enacted legislation that provides federal funds and assistance to states with community protection initiatives. The federal government encourages state civil child protection laws (such as reporting statutes) and assists child protection agencies.

[79]Some enumerated offenses are: arson, 18 U.S.C.A. § 81 (West 1995); assault, *id.* § 113; maiming, *id.* § 114; theft, *id.* §§ 641, 661; receiving stolen property, *id.* § 662; Murder, *id.* § 1111; manslaughter, *id.* § 1112; attempted murder/manslaughter, *id.* § 1113; kidnapping, *id.* § 1201; destruction of property, *id.* § 1363; aggravated sexual abuse, *id.* § 2241; sexual exploitation and abuse of children, *id.* § 2258; robbery, *id.* § 2111.

[80]F. Chris Austin, Note, *Missing Tools in* ***the*** *Federal Prosecution of Child* ***Abuse*** *and Neglect, 8* B.Y.U. J. PUB. L. 209, 226 (1993).

[81]18 U.S.C.A. §§ 2241, 2243, 2251-2258 (West 1995).

[82]Austin, *supra* note 80, at 210 (citing The Sexual Abuse Act of 1986, 18 U.S.C. §§ 2241, 2243 (1988& Supp. III 1991)); 18 U.S.C.A. §§ 2251-2258 (West 1995) (creating a federal offense for sexual abuse of children).

[83]Austin, *supra* note 80, at 210.

[84]DEP'T OF ***ARMY,*** PAMPHLET 27-21, ADMINISTRATIVE AND CIVIL **LAW** HANDBOOK, para. 2-19c (15 Mar. 1992) [hereinafter DA PAM. 27-21]

eral control (acts made criminal under the Property Clause, such as trespass);[85] and "criminal laws enforceable regardless of where the offense is committed"[86] (unlimited application, even abroad, such as counterfeiting).

When charging criminal child neglect for on-post offenses under the first category, prosecutors may charge the enumerated offenses. Title **18** of the United States Code specifies that such offenses are crimes committed in the "special maritime and territorial jurisdiction of the United States."[87] This statutory language means that the offense must occur in areas of concurrent or exclusive federal jurisdiction.

Congress has not enacted a federal criminal child neglect statute applicable in the special maritime and territorial jurisdiction of the United States.[88] To fill possible gaps in federal criminal law, Congress enacted the Federal Assimilative Crimes Act (ACA). The ACA allows federal prosecutors to adopt state criminal statutes as federal law for offenses occurring in areas of concurrent and exclusive jurisdiction.89 The ACA provides that whoever, in or on any lands reserved or acquired for the United States use under exclusive or concurrent jurisdiction, is guilty of any act or omission which, although not punishable by any federal law, would be punishable under state law, "shall be guilty of a like offense and subject to like punishment."[90]

To prosecute on-post offenses of child neglect, federal prosecutors may use the ACA to assimilate state laws.[91] However, assimilation fails to provide consistency to service members and dependents because the state criminal child neglect statutes are inconsistent from state to state and nonexistent in some jurisdictions.92

Aside from inconsistent and disparate treatment from station to station, another drawback is that ACA application causes proce-

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[85] *Id.* para. 2-15; 18 U.S.C.A. § 1382 (West 1995).

[86] DA PAM. 27-21, *supra* note 84, para. 2-19c.

[87] 18 U.S.C.A. § 7(3) (West 1995).

[88] However, in 1993 such legislation was introduced, *see* H.R. 3366, 103d Cong., 1st Sess. (1993). *See also infra* notes 402-10 and accompanying text (section entitled, *A Proposed Amendment to Title 18: The Child Neglect Act of 1996).*

[89] United States v. Best, 573 F.2d 1095 (Cal. Ct. App. 1978); United States v. Holley, 444 F. Supp. 1361 (D.C. Md. 1977).

[90] 18 U.S.C.A. §§ 13(a), 7 (West 1995).

[91] In the United States, state and local authorities may try civilian dependents for criminal child neglect occurring off post and on areas of concurrent jurisdiction, proprietary jurisdiction, and in areas of partial jurisdiction where the state has reserved criminal jurisdiction. *See generally* DA **PAM.** 27-21, *supra* note 84.

[92] *See infra* notes 324-63 and accompanying text (section entitled, *Comparison of State Child Neglect Statutes).*

dural problems in trials involving child maltreatment. Specifically, when using the **ACA,** prosecutors may experience difficulty in charging the accused, proving the offense, and sentencing procedures.

Initially, federal prosecutors may find it difficult to determine appropriate charges. Because the **ACA** only assimilates the state *crimina2* law where the installation is located, prosecutors may find it difficult distinguishing a state civil or regulatory statute from a criminal statute.[93] Furthermore, charges involving mixed federal-state criminal statutes may cause other problems. In cases involving different types of maltreatment, both federal and state law apply (as with children who are sexually abused and neglected); and simultaneous application of both laws increases complexity for prosecutors and jurors.[94] Because state law that conflicts with federal law or policy is prohibited from assimilation,[95] prosecutors may be unsure when to assimilate a state statute.

Once the trial begins, increased proof requirements arise when prosecutors use the **ACA.** The prosecutor must provide proof of exclusive or concurrent legislative jurisdiction of the area where the crime occurred; prosecutors may find such proof difficult.96 Because a military installation may have one, or any combination of the following types of jurisdiction: (1)exclusive federal legislative jurisdiction; (2) concurrent legislative jurisdiction; (3) partial legislative jurisdiction; and (4) proprietary interest, the prosecutor could face additional hurdles in proving jurisdiction.97

Even after a conviction, prosecutors who use the **ACA** face problems establishing appropriate sentencing guidelines. After trial on the merits, the government must assist the court in determining applicable sentencing (or punishment) to fulfill the ACA's "subject to **a** like punishment'' requirement.[98] Determining whether a state's

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[93]John B. Garver III, *The Assimilative Crimes Act Revisited: What's Hot, What's Not,* ARMY LAW., Dec. 1987, at 13.

[94]Austin, *supra* note 80, at 222.

[95]Garver, *supra* note 93, at 18. The UCMJ does not preempt assimilation. *See* United States **v.** Walker, 552 F.2d 566 (Va. Ct. **App.** 1977) ***cert.*** *denied,* 434 U.S. 848 (1978). However, in trial by court-martial, if the offense falls under a punitive UCMJ article then the government must charge the UCMJ punitive article and not the Assimilative Crimes Act. *See* MANUAL FOR COURTS-MARTIAL, United States, pt. IV, para. 60c(5)(a) (1984) [hereinafter MCM].

[96]Garver, *supra* note 93, at 14. In some cases this proof requirement is very difficult and must be established with evidence on the merits. *Id.*

[97]RALPH BLANCHARD, NCCAN, PROTECTING CHILDREN IN MILITARY FAMILIES: A COOPERATIVE RESPONSE 15-16 (1992) [hereinafter BLANCHARD, PROTECTING CHILDREN]. *See also* DA PAM 27-21, *supra* note 84, para. 2-5b.

[98]Garver, *supra* note 93, at 19-20.

statutory civil sanctions or parole conditions are included as punishment also may cause sentencing problems.[99]

c. Problems in Areas of Exclusive Federal Legislative Jurisdiction — The ACA allows the assimilation of state *criminal* child neglect statutes and only applies in areas of *exclusive* or *concurrent* jurisdiction. The ACA does not assimilate state civil child protection statutes. Absent a state criminal child neglect statute, many installations are forced to rely on state civil statutes. However, determining whether state *civil* child protection laws apply on the federal installation can be difficult. The type of jurisdiction on federal land determines what law (state or federal) applies on that property. Depending on what type of legislative jurisdiction exists on the installation, federal-state relationships differ from installation to installation.

In areas of concurrent legislative jurisdiction, both state and federal laws (civil and criminal) apply. Both sovereigns may exercise authority and, "to the extent that there is no interference with the federal function or military mission,'' state officials may enforce state laws in state courts.[100] Because of the void in federal child maltreatment legislation, the practical effect is for state laws apply in concurrent jurisdiction areas.

In partial jurisdiction areas, the state has reserved to itself some, but not all powers from the federal government. "Either the Federal Government, or the State or both, have some legislative authority but less than complete legislative authority."[101]

In areas where the federal government has a lease or proprietary agreement with the state, and the federal government occupies, but has no legislative jurisdiction (but some degree of ownership), only state civil and criminal laws apply.[102]

However, when child maltreatment occurs in areas of exclusive federal legislative jurisdiction, the principal "question is whether state laws regarding child abuse can be applied."[103] Normally, state civil laws "have no operation or effect."[104]

Areas of exclusive jurisdiction (and in some places partial

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[99] *Id.*

[100] AR 608-18, *supra* note 40, app. C-lb.

[101] DA PAM. 27-21, *supra* note 84, para. 2-5b(3).

[102] *Id.* para. 2-5b(4).

[103] Richard S. Estey, *State Jurisdiction in Child Abuse Cases,* *ARMY* LAW., Feb. 1979, at 12.

[104] *Id.* at 12.

jurisdiction) are considered enclaves.[105] "Federal-state relations respecting enclaves differ according to the issue involved and whether or not the enclave is viewed as part of the state in which it is located."[106] Two differing theories exist as to how an enclave is to be treated. Courts may consider the enclave a state within a state, where state law does not apply.[107] Alternatively, courts may decide that because there is no "friction" with federal law, they will avoid the "fiction" of a state within a state.[108]

In any case, because of this legal debate, civilian child protection agencies, local law enforcement, and civil courts that issue restraining orders are unsure whether: (1) they may order or remove a child or parent from the home; **(2)** they have authority to order or conduct home inspections; and **(3)** they will face civil personal liability (especially police officers) for taking such actions in areas of exclusive jurisdiction.[109] Local agencies may be reluctant, or even decline, to investigate or take any of these actions. Civilian authorities may decide that the risks outweigh the benefits of these actions. **As** a result, some advocates call for a congressional "domestic violence exception" from "exclusive legislative jurisdiction of federal enclaves so that all enclave domestic violence victims are assured legal recourse."[110]

To resolve difficulties, the DOD encourages cooperating with local civilian authorities and establishing memoranda of agreement between military installations and civilian authorities.[111] In the alternative, the federal government can provide legislation in the area of child abuse and neglect and resolve these civil legal issues.

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[105] DA PAM. 27-21, supra note 84, para. 2-8.

[106] *Id.*

[107] *See* Collins v. Yosemite Park & Cherry Co., **304** U.S. 518 (1938).

[108] *See* generally DA PAM. 27-21, supra note 84; Interview with Major Steve Castlen, Instructor, Administrative & Civil Law Division, The Judge Advocate General's School, Army, Charlottesville, Virginia (Feb. **24,** 1995). Major Castlen believes that the federal government could resolve this problem if it retroceded these areas of exclusive jurisdiction back to the states. See Howard v. Commissioners of Louisville, 344 U.S. 624 (1953).

[109] DA PAM. **27-21,** supra note 84, para. 2-10d. ***See*** also In re Terry Y., 161 Cal. Rptr. **452** (Cal. Ct. App. 1980) (in removal of battered child on a federal enclave, court held that federal policy on child protection indicated that states would make services available to children on the federal installation); Board of Chosen Freeholders v. McCorkle, 237 A.2d 640 (N.J. Super. Ct. App. Div. 1968) (holding that state child welfare programs applied to children on the installation); Cobb **v.** Cobb, 545 N.E.2d 1161 (Mass. 1989) (holding state court's authority to issue a restraining order enforceable on Fort Devens, Massachusetts, when the abuse victim was a service member who resided on the federal enclave).

[110] Michael J. Malinowski, Note, Federal Enclaves and Local *Law:* Carving Out ***a*** Domestic Violence Exception to Exclusive Legislative Jurisdiction, 100 YALE L.J. 189, 191 (1990).

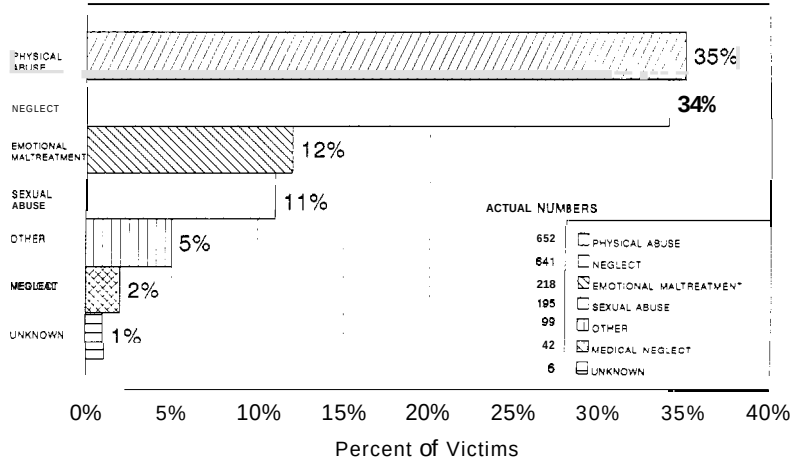
[111] *See* DOD DIR. 6400.1, supra note 14, para. E2h.

2. Difficulties Overseas—For child neglect incidents that occur abroad, prosecutors, commanders, and family advocacy committees cannot fall back on state civil or criminal statutes for resolution. Moreover, prosecuting civilian dependents for criminal child neglect committed abroad is even more challenging than proceeding against this misconduct in the United States. With approximately nineteen percent of the total active duty military personnel assigned outside the United States and its territories,[112] the lack of criminal jurisdiction over civilians accompanying the force creates problems.

a. Cultural Differences Can Cause Difficulties—While assigned overseas, service members and their dependents experience magnified stressors of military life.[113] Assignments in foreign countries require added adjustments and cause stress due to language barriers, lack of on-post housing, and distance from home.[114] As a result, in military communities abroad, child neglect is common. As indicated in Figure 1, in 1992, the armed forces assigned outside the continental United States (OCONUS) reported 683 sub-

VICTIMS BY TYPE OF CHILD ABUSE OR NEGLECT
ARMED FORCES--0-CONUS 1992

Figure 1



TOTAL NUMBER OF VICTIMS = 1,853

[112] MILITARY FAMILY CLEARINGHOUSE, OFFICE OF THE UNDER SECRETARY OF DEFENSE, MILITARY FAMILY DEMOGRAPHICS: PROFILE OF THE MILITARY FAMILY 8 (1994) [hereinafter MILITARY DEMOGRAPHICS].

[113] Ronald E. Prier & Myra I. Gulley, *A Comparison of Rates of Child Abuse in U.S. Army Families Stationed in Europe and in the United States,* 152 MIL. MED. 437, 439 (1987). *See infra* notes 208-23 and accompanying text (section entitled *Incidence of Child Neglect in the Military Community).*

[114] Prier, *supra* note 113, at 439.

stantiated child neglect cases (including medical neglect) and 218 substantiated emotional maltreatment.[115]

b. Civilian Offenders: Crime Without Punishment Under United States Law—Military or federal criminal jurisdiction over civilian offenders abroad poses difficulty no matter what the offense. Status of Forces Agreements (SOFA) usually give the United States primary jurisdiction over civilians,[116] but because most federal criminal law does not apply in foreign nations, the United States lacks the ability to prosecute.[117]

Even if federal law applied overseas, only the enumerated offenses and federal offenses explicitly extraterritorial would apply. (Title 18's enumerated offenses do not include child neglect unless the child suffered physical harm and the offense fell under a traditional crime listed). As many scholars have noted, except for explicitly "extraterritorial jurisdiction" federal statutes, federal law does not apply to offenses occurring abroad.[118] As a general rule, host nations have obtained de facto exclusive jurisdiction over civilians accompanying the military forces overseas.[119] Although SOFAs give the United States primary concurrent jurisdiction for crimes committed by service members against dependents,[120] and the UCMJ grants court-martial jurisdiction over civilians accompanying the force,[121] the United States Supreme Court has declared military

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[115]NCCAN, U.S. DEP'T OF HEALTH & HUM. SERVICES, CHILD MALTREATMENT 1992: REPORTS FROM THE STATES TO THE NATIONAL CENTER ON CHILD ABUSE AND NEGLECT 42 (1994) [hereinafter CHILD MALTREATMENT 19921. Cultural differences and the presence of noncommand-sponsored dependents overseas may cause a decrease in reports of child neglect; therefore, these statistics may be understated. *See infra* notes 191-97 and accompanying text.

[116]*See* Steven J. Lepper, *A Primer on Foreign Criminal Jurisdiction,* 37 A.F. L. REV. 169 (1994).

[117]James K. Lovejoy, *USAREUR Regulation* **27-9,** *"Misconduct by Civilians,"* ARMY LAW., June 1990, at 16 **n.4.** Most scholars contend that "special maritime and territorial jurisdiction of the United States" does not extend federal court jurisdiction to foreign countries. *See* Robinson O. Everett & Laurent R. Hourcle, *Crime Without Punishment— Ex-Servicemen, Civilian Employees and Dependents,* 13 A.F. L. REV. 184 (1971); **DA** PAM 27-21, *supra* note 84, para. 2-19c. *But see* United States v. Erdos, 474 F.2d 157 (4th Cir.), *cert denied,* 414 U.S. 876 (1973) (holding that "special maritime and territorial jurisdiction" under 18 U.S.C. for federal crimes extended to United States embassy property that the United States leased and further holding that United States district court had jurisdiction to try American citizen who committed murder on United States embassy property abroad).

[118]*See* Lovejoy, *supra* note 117, at 17 **n.4.;***see generally* Gregory A. McClelland, *The Problem of Jurisdiction Over Civilians Accompanying the Forces Overseas—Still with Us,* 117 MIL. L. REV. 153 (1987).

[119]Lepper, *supra* note 116, at 172.

[120]*See* Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67, art. VII, para. 3. The United States has similar agreements with other receiving nations, such as the Republic of Korea. Those agreements have similar provisions.

[121]UCMJ art. 2(a)(11) (1984); *see also* MCM, *supra* note 95, R.C.M. 202 discussion.

jurisdiction over civilians during peacetime unconstitutional.[122]

In cases where the United States has primary concurrent jurisdiction, commanders may have the first option to take action against the civilian offenders. In many child neglect or abuse cases, commanders must choose between imposing adverse administrative action against the offender or turning the offender over to local authorities for criminal prosecution.[123] Relinquishing jurisdiction to local authorities requires the military to notify the local authorities; while military action requires commanders to have existing punitive regulations.[124] The only adverse actions against civilians that commanders may use are the limited administrative remedies, such as withdrawal of exchange and commissary privileges, removal from government housing, and involuntary return to the United States.[125] However, by withdrawing access to necessities, administrative sanctions may cause more criminal neglect to occur in the offender's home.

In many areas of the world, cultural differences and different standards for parental responsibilities and child care create added difficulty when relying on host nations to prosecute defendants.[126] Host nations may not even have criminal child neglect statutes. Cultural differences also may inhibit host nations from taking action against civilian offenders.

When host nations do not exercise jurisdiction, the United States still might try civilians for crimes committed abroad, if federal statutes existed that granted extraterritorial jurisdiction over offenses.[127]

C. Prosecuting Army Service Members for Child Neglect Under the UCMJ: No Injury — No Charge

Unlike civilian offenders, the military may charge service

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[122] *See* Reid v. Covert, 354 U.S. 1 (1957) (holding United States could not court-martial civilian dependents of service members for offenses while abroad); Kinsella v. Singleton, 361 U.S. 234 (1960) (court-martial of civilian dependent for noncapital offense held unconstitutional); Grisham v. Hagan, 361 U.S. 278 (1960) (court-martial of Department of Army civilian for capital offense held unconstitutional); United States v. Averette, 19 C.M.A. 363, 41 C.M.R. 363 (1970) (holding that "time of war" jurisdiction over civilians only applies during a congressionally declared war).

[123] Lepper, supra note 116, at 180.

[124] *Id.*

[125] McClelland, supra note 118, at **174.** In supporting the contention that administrative sanctions are inadequate, the author cites Comptroller General of the United States, Report to the Congress: Some Criminal Offenses Committed Overseas by DOD Civilians Are Not Being Prosecuted Legislation Is Needed, 96th Cong., 1st Sess. (1979) [hereinafter GAO Report].

[126] *See* generally Johnson, supra note **51.**

[127] McClelland, supra note 118, at 174.

members for crimes committed anywhere. Although the government may try a soldier in federal court for offenses committed on the installation, prosecutors would face the same difficulties previously discussed when trying service members in federal court. However, a soldier is subject to court-martial jurisdiction for crimes against a military family member.[128] Under clause three of Article 134, UCMJ, the government also may charge service members in a court-martial for violations of federal law, including assimilated state law.[129]

The UCMJ purportedly "regulates a far broader range of the conduct of military personnel than a typical state criminal code regulates of the conduct of civilians."[130] However, based on recent caselaw, charging child neglect under the UCMJ may be difficult, and requires some evidence of physical harm to the child, a violation of a punitive regulatory provision, or a violation of state law.

1. Entering the *"Morass" of* Child Neglect, Absent a Statute or Punitive Regulatory Provision—Few military court opinions have addressed the topic of child neglect. Recently, however, both the United States Army Court of Military Review (ACMR) and the United States Air Force Court of Military Review (AFCMR) have specifically addressed the potential charge of child neglect under the UCMJ and rendered opposing opinions. Both cases involved child neglect offenses and in both cases the government charged the accused with a violation of Article 134.

Article 134 provides for the prosecution of "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital."[131] In United States *v. Wallace,*[132] the ACMR reviewed a "home alone" case, where the accused locked his three children (ages approximately seven, six, and one) unattended in government quarters from 2000 to 0230. The accused's wife, also a service member, called home while away on temporary duty (TDY) and discovered the children unsupervised. She called the Charge of Quarters and had him send a neighbor, Sergeant (SGT) *M*, to pick up the children. At about **2215,** SGT *M*

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[128] DA PAM. 27-21, *supra* note 84, para. 2-19c (citing Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes, signed by the Attorney General and Secretary of Defense on 14 August and 22 August 1984, respectively).

[129] For a more thorough explanation of Article 134, UCMJ, *see* Criminal Law Div. Note, *Mixing Theories Under the General Article,* ARMY LAW., May 1990, at 66.

[130] Parker v. Levy, 417 U.S. 748, 750 (1974).

[131] UCMJ art. 134 (1984).

[132] 33 M.J. 561 (A.C.M.R. 1991).

went to the house. The six-year-old girl was crying, distraught, and took fifteen minutes before she was able to unlock the door.

At issue was whether the accused's conduct brought discredit upon the service. At trial, the military judge found the accused guilty of service discrediting conduct for the following reasons:

> the relative ages of the children; the length of time the children were unattended; the length of time the Accused was absent from his quarters; again, that was until 0230; the failure of the Accused to adequately train his two older children on how to unlock the door in case of an emergency; the distance that he went away from the children; the complete absence of the mother; and failure to notify anyone that he was leaving the children unattended.[133]

On appeal, the ACMR stated that "[albsent a statute or a punitive regulatory provision" it refused to enter the "morass . . . by holding that child neglect standing alone, constitutes an offense under Article **134,** UCMJ."[134] Furthermore, the ACMR pointed out that for cases involving conduct resulting in injury to a child, prosecutors may charge existing punitive articles.[135]

The ACMR focused on three reasons for its decision. First, the children did not suffer any apparent harm. Secondly, although no "universal child neglect standard exists," most state child neglect offenses are directed at neglect in connection with nonsupport and defining an offense would prove to be difficult. Most importantly, the ACMR noted that the accused did not have notice that his conduct was a criminal offense, a constitutional prerequisite to prosecution.[136] The ACMR stated that "[n]o person can be held criminally responsible for conduct which he could not reasonably understand to be prohibited" and furthermore, the ACMR doubted that the accused "was on notice that his conduct was a criminal offense."[137]

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[133] Summarized Record of Trial, United States v. Wallace, Thomas E., at 39 (1 Nov. 1989) [hereinafter Record of Trial].

[134] *Wallace*, 33 M.J. at 564.

[135] *Id.* The accused was found guilty by exceptions and substitutions of the following:

> [Appellant] did, at Robinson Barracks, Federal Republic of Germany, on 16 July 1989, violate his duties of care to his then seven-year old stepson, Richard, his about six-year old daughter Jennifer, and his one-year old son Thomas, by locking the children in government quarters at 2000 hours without training them how to unlock the door in case of an emergency and without providing any responsible care for those children for approximately two and one-half hours.

Id. at 562 n.1.

[136] *Id.* at 563-64.

[137] *Id.* (citations omitted).

The ACMR did not focus on the potential harm to the children or that SGT *M,* (with a master's degree in counseling and who had worked with abuse cases) said two of the children were crying, whimpering, upset, and needed to be consoled, held, and calmed down.[138] The ACMR failed to recognize the possibility of latent injury, even though latent injury was possible because the parents frequently left the children home alone.[139] The decision also fails to mention the unavailability of the Assimilative Crimes Act because the offense occurred in Germany.

By its decision in Wallace, the ACMR has effectively limited Army commanders to the imposition of administrative sanctions in child maltreatment cases in which there is no physical harm to the child.[140] Specifically, the ACMR reasoned that "conduct which results in injury to children can be charged under existing punitive provisions of the Uniform Code of Military Justice. Otherwise, incidents of child neglect should be processed administratively under the Army Family Advocacy Program."[141] The ACMR essentially disregarded potential danger or injury to the child, and the less than obvious injury inherent in child neglect. Although the UCMJ provides a more severe punishment for completed crimes, it provides punishment for crimes such as attempted offenses, with or without discernible injury.[142]

In United States *v. Valdez,*[143] the ACMR followed Wallace and

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[138]Record of Trial, *supra* note 133, at 22.

[139]*Wallace*, 33 M.J. at 562-63 (accused told police that he and his wife let the oldest child watch the children for short periods of time).

[140]*See* Defense Appellate Division Note, *No* Harm-No Foul; Absent *Actual* Injury, Army Court *Finds* No Criminal Offense *in* Child Neglect, ARMY LAW., Oct. 1991, at 32.

[141]*Wallace*, 33 M.J. at 564 (footnote omitted).

[142]*See* generally SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESS—CASES AND MATERIALS (4th ed. 1983)

> "[I]t is possible to attempt a crime of negligence. . . one that can be committed negligently; but some crimes of this class are sometimes committed intentionally or recklessly. There is no reason why a person should not be convicted of attempting to commit an intentional violation of a law prohibiting negligence. Suppose that D, knowing that his car has no brakes, attempts to start it in order to drive it; he is stopped by a policeman. He has, in fact, intentionally attempted to do an act that when done would be negligent and dangerous. There is no logical reason why he should not be convicted of attempt to drive dangerously."

Id. at 567 (quoting G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 619-62 (2d ed. 1961)); See *also* generally WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., CRIMINAL LAW (2d. ed. 1986). But see United States v. Roa, 12 M.J. 210, 213 (C.M.A. 1982) (holding that there are no such offenses as attempted negligent homicide or attempted manslaughter by culpable negligence).

[143]United States v. Valdez, 35 M.J. 555 (A.C.M.R. 1992), *aff'd,* 40 M.J. 491 (C.M.A. 1994).

dismissed another child neglect specification charged under *both* clauses one and two of Article 134.144 Like ***Wallace,*** the offense occurred in Germany. In ***Valdez,*** the accused's eight-year-old daughter, Michelle, had numerous bruises, abrasions, suffered from battered child syndrome, was underweight and underdeveloped, and suffered from malnutrition.[145] The accused and his wife forced the victim to sleep uncovered on a mat on the bathroom floor. The entire family (father, step-mother, and two older step-daughters) physically abused Michelle. The evidence also showed that the victim never was enrolled in school. Michelle eventually died from septicemia and staphylococcul pneumonia. Staff Sergeant Valdez, the accused, had been investigated for child abuse several years earlier at Fort Benning, Georgia, and fearing a new accusation of abuse, therefore, was reluctant to bring Michelle to the hospital.[146]

Because the child victim in ***Valdez*** died, the central issue of the case was not the child neglect ("failure to provide proper care") specification. The ACMR focused on the remaining charges of unpremeditated murder, maiming, and larceny of military property. As part of their decision, the ACMR merely followed ***Wallace*** and dismissed the child neglect specification. The ACMR then upheld the accused's conviction for unpremeditated murder for child abuse, withholding medical attention, failure to provide adequate nutrition, maiming (for kicking the victim), and failing to provide medical care. When the COMA reviewed the case, it merely noted, in a

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[144]The child neglect specification stated the following:

> In that Staff Sergeant Ricardo Valdez, US Army, did, at West Berlin and Mainz-Finthen, Federal Republic of Germany, between on or about 14 November 1986 and 28 March 1990, by intentional design, wrongfully fail to properly care for Michelle Valdez, his child who was five to eight years old during this period, by failing to enroll her in the appropriate level of school or provide similar instruction at home, and by failing to ensure that she was properly immunized as medically prudent and by failing to seek medical or psychiatric treatment of [sic] counseling for his daughter's medical and/or psychiatric problems, which included injuries which he knew had been inflicted upon her, and from which she was in pain and suffering, and urination and defecation incontinence, and by failing to provide proper nutrition and a healthy living environment for her, such intentional neglect under the circumstances being to the prejudice of good order and discipline in the armed forces, and/or after her death from said neglect became known to persons outside the military community, said death and neglect and news of the same being reasonably foreseeable, also being of a nature to bring discredit upon the armed forces.

Id. at 558.

[145]United States v. Valdez, 40 M.J. 491, 492 (C.M.A. 1994). The accused brought the victim into the hospital eight hours after death and rigor mortis had set in. *Id.* at 493.

[146]*Valdez*, 35 M.J. at 559.

footnote, that the lower court had dismissed the neglect specification and the basis for dismissal.

Although the ACMR has chosen to limit alternatives for charging child neglect, the AFCMR has taken a different stance. In the 1990 unreported opinion of *United States v. Foreman,*[147] without providing any rationale, the AFCMR held that the offense of child neglect "is viable under clause 2 of Article 134."[148]

Foreman involved an accused who pleaded guilty to wrongful use of cocaine and criminal child neglect. Staff Sergeant Foreman, the accused, resided with a newborn daughter, and two sons ages three and two in government quarters. In violation of Article **134,** she was charged with: (1)using cocaine the month prior to her child's birth; (2) failing to bathe and to change the diaper of her newborn with sufficient frequency, causing severe diaper rash and a scalp condition; and (3) failing to clean government quarters to such a degree that her children's health was endangered.[149]

The AFCMR reviewed the three acts of misconduct and, while finding that the evidence on the record did not support the accused's guilty plea, held that a charge of criminal child neglect as service discrediting conduct was viable. However, the AFCMR held that an unborn fetus could not be a victim of criminal neglect.

Although the Army and Air Force cases involved different types of child neglect,[150] the COMA has not settled this apparent disagreement between the services. Consequently, the military services are proceeding under inconsistent court guidance.

2. Applying the Punitive Articles **"As** Is"—Prior to *Wallace,* one reasonably could have believed that the government could prosecute child neglect under the punitive UCMJ articles without a requirement of physical injury.[151] In such cases, limited charging options still are available.

For example, Article 92, UCMJ, Failure to Obey a Lawful Order or Regulation, provides a number of charging alternatives. If

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[147]United States v. Foreman, ACM 28008 (A.F.C.M.R.25 May 1990).

[148]*Id.* at 2.

[149]*Id.* (upholding the accused's conviction for using cocaine, but finding that the stipulation of fact and admissions during the providence inquiry did not sustain the conviction for child neglect. The AFCMR refused to find the accused guilty of child neglect to an unborn fetus.).

[150]The ACMR reviewed a "home alone," abandonment offense while the AFCMR reviewed a deprivation offense.

[151]Adrian J. Gravelle, *Prosecution of Child Abusers,* vol. 111, no. 7, Trial Counsel Forum, July 1984, at 2 (hand out issued by the Trial Counsel Assistance Program, Government Appellate Division, Falls Church, Virginia).

a service member violates a punitive regulation, then trial counsel may charge an Article 92 violation. Commanders also may give lawful orders or inform a service member of the duty to clean government quarters. Once the duty is not fulfilled, trial counsel may charge the service member with failure to obey a lawful order[152] and dereliction of duty.[153] However, these potential charges require repeated failures and provide service members with additional opportunities to injure children. Lawful order violations do not provide a charge for potentially egregious first-time offenses, such as abandonment.

In appropriate cases involving officers, prosecuting child neglect under Article 133, UCMJ, Conduct Unbecoming an Officer and Gentleman, remains a possibility.[154] Although military courts have not specifically decided any abandonment, endangerment, or deprivation cases under Article 133, the COMA has upheld an officer conviction for Article 133 violations for failure to report a spouse for abusing the children and failure to seek treatment for a child.[155]

Since the late 1800s, the military services have held officers criminally liable for abuse and neglect of dependents based on the expectation of "a more highly developed sense of moral and civil responsibilities."[156] An officer has an essential, required duty "to protect and look after the welfare not only of his troops but also the members of his family" and is accountable for acts and conduct involving cruelty, neglect, and indifference toward injured family members.[157] Consequently, in officer cases, the courts in all likelihood will uphold child neglect offenses charged under Article 133.

Under Article 134, based on Wallace, Army trial counsel appear limited to charging child neglect under clause three, assimilating state offenses. At least in the Army, absent a state statute, charges for child neglect under clauses one and two, disorders or neglects to the prejudice of good order and discipline, may not stand.[158] Charging child neglect under clause three using the

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[152]UCMJ arts. 90, 91 (1984).

[153]*Id.* art. 92.

[154]*See* United States v. Miller, 37 M.J. 133 (C.M.A. 1993).

[155]*See* id.

[156]Arthur A. Murphy, The Soldier's *Right to* a Private Life, 24 MIL. L. REV. 97, 107 (1964).

[157]*Miller*, 37 M.J. at 138-39 (Sullivan, C.J. concurring).

[158]In Wallace, the ACMR did not limit its decision to only clause 2. By stating "constitutes an offense under Article 134, UCMJ," the ACMR said a charge under clause 1, prejudicial to good order and discipline, also could not stand. United States v. Wallace, 33 M.J. 561, 564 (A.C.M.R. 1991). The ACMR clearly held that the government could not charge child neglect under either clause 1 or 2 of Article 134 when they dismissed the specification in United States v. Valdez, 35 M.J. 555 (A.C.M.R. 1992). See *also* infra notes 191-97 and accompanying text.

Assimilative Crimes Act may result in the same difficulties, inconsistencies, and complexities, as charging civilian offenders.[159]

3. A Trend *in* Prosecution *of* Parental Omissions — Although the COMA never has directly addressed the possibility of a criminal charge for child neglect against enlisted service members, it has upheld convictions for parental omissions resulting in death or injury. Military courts consistently have held that even enlisted service members, as parents, are responsible for some parental failures; specifically, parental failure resulting in a child's death.

Military courts usually uphold convictions for failures such as involuntary manslaughter160 (requiring culpable negligence) or the lesser-included offense of negligent homicide[161] (requiring simple negligence). In these cases, military courts have recognized that a parent "owes a legal duty to provide medical care to a minor unemancipated child in the parent's custody;"[162] can be criminally liable for negligently leaving a child with a known abusive caretaker;[163] is responsible for a child's welfare and safety, especially when the child is very young;[164] and may be held criminally liable for "failing to provide the necessities of life."[165]

Additionally, while the ACMR requires intent to harm as a prerequisite to charging child neglect, the UCMJ includes many offenses that may be committed through negligence or recklessness. The military may charge an accused with the following: missing movement through *neglect*;[166] negligently being derelict in his or her

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[159]*See* Defense Appellate Division Note, The Pitfalls of Charging Offenses Under the Assimilative Crimes Act, ARMY LAW., Sept. 1992, at 23 (describing the extensive procedural problems with charging conduct under clause 3, Article 134 including: that the government must prove, on the record, that the state ceded jurisdiction and the United States accepted, and existence of federal legislative jurisdiction over the geographical location of the situs of the offense; and that the existence of any punitive applicable UCMJ preempts use of the assimilated state statute) *Id.* See also United States v. Irvin, 13 M.J. 749 [A.F.C.M.R. 1982) (illustrating the procedural difficulties when trying child abuse cases under clause 3 of Article 134 and the Assimilative Crimes Act).

[160]UCMJ, art. 119 (1984).

[161]*Id.* art. 134.

[162]United States v. Robertson, 33 M.J. 832, 835 (A.C.M.R. 1991) (charged with an Article 119 violation, the ACMR found accused guilty of Article 134, negligent homicide for failing to get the necessary medical care for son who had anorexia).

[163]United States v. Perez, 15 M.J. 585 (A.F.C.M.R. 1983) (upholding a conviction for negligent homicide for negligently leaving a five-month-old son with a boyfriend who on two previous dates had inflicted serious bodily injury on the child): see *also* United States v. McGhee, 33 M.J. 763, 765 (A.C.M.R. 1991) (accused convicted of negligent homicide for negligently leaving the child with someone who was likely to inflict grievous bodily harm resulting in death).

[164]*Perez,* 15 M.J. at 587.

[165]United States v. Valdez, 40 M.J. 491, 495 (C.M.A. 1994).

[166]UCMJ art. 87 (1984).

duties;[167] *negligently* damaging, destroying, or losing military property;[168] *negligently* suffering (causing or permitting) military property to be lost, damaged, destroyed, sold, or wrongfully disposed of;[169] *recklessly* wasting or spoiling nonmilitary property;[170] *negligently* causing or suffering a vehicle to be hazarded;[171] or *recklessly* operating a vehicle.[172]

Most notably, a service member is criminally liable under Article 108, Damage to Military Property, for allowing or permitting military property "to remain exposed to the weather, insecurely housed, or not guarded; permitting it to be . . . injured by other persons; or loaning it to a person known to be irresponsible, by whom it is damaged."[173] Yet, a service member may not be criminally liable for the same conduct toward his or her own child, unless the child dies or suffers some injury. For example, based on *Wallace,* if authorities had discovered Staff Sergeant Valdez's child eight hours before death, as opposed to after death, absent evidence of physical abuse (kicking), the government would have been unable to charge the accused.

D. The Failure of Adverse Administrative Actions

In the absence of the availability of criminal charges for child neglect under the UCMJ, commanders and prosecutors are forced to consider adverse administrative actions.

1. Attempts at Installation Policies and Regulations — Some military installations have published post policies or regulations providing guidance to service members on parental responsibilities. These publications tend to be vague, inconsistent from post to post, and most are not punitive.[174] Some attempts to implement punitive regulations fail because they do not include the necessary language explaining the potential use of criminal punishment for violations.[175] Additionally, most focus only on the service member or civilian spouse's *failure to supervise* children (abandonment).[176]

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[167]*Id.* art. 92.

[168]*Id.* art. 108.

[169]*Id.* art. 108.

[170]*Id.* art. 109.

[171]*Id.* art. 110.

[172]*Id.* art. 111.

[173]Id. art. 108.

[174]*See infra* notes 191-97 and accompanying text.

[175]United States v. Blanchard, 19 M.J. 196, 197 **(C.M.A.** 1985). Without the required language, the regulations are only guidance. *Id.*

[176]*See infra* notes 191-97 and accompanying text.

Whether or not they are punitive, civilian parents still face no criminal liability (except under state law); commanders can only take administrative action against civilians for violations of regulatory provisions.

2. Withdrawal of Privileges and Benefits—Another military response to criminal child neglect is termination of privileges. In some cases of civilian misconduct, administrative sanctions are effective. However, in child neglect cases, terminating a parent's access to government quarters, medical care, dental care, post exchange privileges, or commissary privileges,[177] is generally counterproductive. Withdrawing benefits may cause the child further suffering.

Moreover, when reviewing the lack of jurisdiction over civilians accompanying the force, the GAO noted the inadequacy of administrative sanctions for civilian misconduct. "[Aldministrative sanctions generally do not provide credible punishment or deterrence and are often inappropriate to the offense. . . . [I]n many cases, punishment given soldier-offenders was considerably more severe than the administrative 'slaps-on-the-wrist' given their civilian codefendants, causing morale problems among soldiers."[178] Aware of the inability of the United States to take action against civilians, "military investigators tend to give civilian cases low priority, and may do inferior investigative work in such cases."[179] Creating a federal criminal law in this area might encourage investigator interest.

3. Adverse Administrative Actions for Service Members *Do* Not Fill the Gap—In the absence of criminal sanctions, commanders may use other administrative actions, such as administrative separations, in dealing with service member offenders. However, without a punitive UCMJ article for child neglect, a commander cannot adversely separate a soldier from the Army for one incident of child neglect. Under the Army's personnel system, a commander may initiate adverse separations for the following: conviction by a civil court;[180] minor disciplinary infractions;[181] a pattern of misconduct;[182] commission of a serious offense;[183] or unsatisfactory perfor-

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[177] *See generally* DA PAM. 27-21, *supra* note 84, para. 2-18 (discussing basis for termination of benefits).

[178] McClelland, *supra* note 118, at 178 (citing GAO Report, *supra* note 125, at 11-12).

[179] *Id.* at 178 (citing GAO Report, *supra* note 125, at 10).

[180] DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS— ENLISTED PERSONNEL, para. 14-5 (17 Sept. 1990) [hereinafter AR 635-2001.

[181] *Id.* para. 14-12a.

[182] *Id.* para. 14-12b (separation for discreditable conduct with civil or military authorities or conduct prejudicial to good order and discipline, which the ACMR already has held does not include criminal child neglect). *Id.*

[183] *Id.* para. 14-12c.

mance.[184] For most of these enlisted separations, however, Army regulations require the commander to give the soldier written counseling (after the misconduct), followed by a reasonable opportunity to overcome deficiencies and a rehabilitative transfer (or waiver).

Of these types of separations, only separation for a civil court conviction or commission of a serious offense does not require prior counseling. A civil court sentence of at least six months confinement or authorization of a punitive discharge under the *Manual* for *Courts-Martial*[185] (MCM) for a similar offense is required.[186] Without a punitive article, the second option does not apply to child neglect cases. Furthermore, the first scenario does not usually occur when soldiers commit criminal child neglect. Even when a civil court has convicted a soldier of criminal child neglect, the sentence usually is not over six months; therefore, adverse separation actions would require repeated failures for the commander to issue a punitive discharge.

Although commanders can use other adverse administrative actions, these do not eliminate the soldier from the service. Bars to re-enlistment,[187] written reprimands,[188] and administrative reductions[189] provide some deterrent, but the commander still must wait for subsequent misconduct that may result in further harm. Administrative sanctions require the system itself to eventually force the soldier out of the service. Unless the soldier requests a discharge after he receives a bar to re-enlistment,[190] the commander must wait until the soldier falls within the parameters of another type of separation.

E. Empirical *Data:* Problems Identified Through *an* Army Survey

To identify other problems occurring on installations and to verify the extent of the problem of child neglect, the author mailed

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[184] *Id.* para. 13-2.

[185] MCM, *supra* note 95.

[186] AR 635-200, *supra* note 180, para. 14-5a.

[187] *See* DEP'T OF ARMY, REG. 601-280, TOTAL ARMY RETENTION PROGRAM, ch. 6 (17 Sept. 1990) [hereinafter AR 601-2801 (commander must impose a bar to re-enlistment, if service member fails to have an approved family care plan within two months of counseling); DEP'T OF *ARMY,* REG. 600-20, COMMAND POLICY, ch. 5 (30 Mar. 1988)(102, 1Apr. 1992) [hereinafter AR 600-20]; AR 601-280, *supra* para. 6-4e (103, 27 Nov. 1992).

[188] *See generally* DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION (19 Dec. 1986).

[189] *See* DEP'T *ARMY,* REG. 600-8-19, ENLISTED PROMOTIONS AND REDUCTIONS, ch. 6 (1Nov. 1991) (reduction for civil conviction or inefficiency).

[190] *See* AR 635-200, *supra* note 180, para. 16-5; AR 601-280, *supra* note 187, para. 6-5f.

questionnaires to Army Staff Judge Advocates.[191] The questionnaires included questions for the Staff Judge Advocate's Family Advocacy Management Team (FACMT)representative, and chiefs of criminal law divisions.[192] This survey was not intended to provide statistical data about child neglect, but merely to identify common difficulties in the military community when dealing with child neglect cases. Respondents verified that child neglect is a common problem in the military community. The respondents also provided insight into common procedural difficulties, particular cases, and different responses.[193]

Survey respondents identified many problems involving relationships between military and civilian authorities when investigating child neglect on post. Some installations had difficulty obtaining agreements, while others had problems with existing agreements. Some installations whose boundaries extended into two states were able to obtain memoranda of agreement or understanding from one state, but not another state. This caused inconsistent results among like cases. In one area of the installation, cases may be handled differently than cases arising in other areas. Other installations, that have agreements returning federal land to the state (retrocession agreements), continue to have problems allocating responsibilities and resources between the post and the state. Some states cooperated with the military, but refused to sign a memorandum of agreement or a memorandum of understanding.

Inconsistencies were apparent even in the same state. Some states with more than one installation within their boundaries made retrocession agreements with one installation, but not with the other military installations.

Survey respondents also indicated that multiagency investigations took place. Some respondents described communication problems between military and civilian agencies, such as problems in obtaining information from civilian authorities and gaining their

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[191] 130 surveys were mailed on **25** November **1994** and responses were received until **4** March 1995. A total of ***53*** responses were received. ***See*** *infra* Appendix A, Army Staff Judge Advocate Questionnaire: Summary of Responses, which provides a summary of survey questions, summarizes responses to questions not requiring a commentary, and a compilation of data (hereinafter Appendix A). Some responses were not included in the total number of responses (T), because the answers were nonresponsive. For example, if respondents included abuse with neglect cases in providing total case numbers, the answer for that question was not included in the data compiled. Some questionnaires were sent out separately, but returned under one cover; those responses were counted separately.

[192] *See* Appendix A (providing a general overview of survey questions and applicable responses).

[193] Because of the difficulty in obtaining data from civilian authorities. judge advocates were not asked about the civilian authorities' criminal actions against service members and civilian spouses.

participation in military committee meetings. Other respondents reported that military investigators did not want to investigate because the military investigators did not see any "criminal offense."

Respondents abroad reported that many families are noncommand sponsored (i.e., the commander has not endorsed the families to be present in a military dependent status). As a result, child neglect cases often go unreported for fear of exposing the dependents' presence, which in turn could adversely affect the service member's career. Furthermore, respondents abroad indicated that most host nations do not have organizations equivalent to state child protection agencies. Additionally, although noncommand-sponsored children may not have access to DOD schools, parents do not always enroll them in private schools.

Data compilation provided some beneficial information. Noteworthy is a general observation about the family advocacy program. Survey respondents indicated a lower percentage of civilian spouses—as compared to soldiers—enrolled in the family advocacy program. Although the respondents did not specify why they did not enroll these spouses, this lower percentage may be because civilian spouses did not voluntarily participate in the program. **As** one survey respondent noted, civilian spouses are only *asked* to participate in FACMT, "[W]e have no enforcement power over civilians." Survey data also indicated a higher rate of child neglect on post as compared to off post; and a high incident rate of children removed from soldiers' homes because of child neglect.[194]

Chiefs of criminal law divisions provided information about how commanders are responding to the problems with punitive options. Several respondents reported that commanders ordered soldiers to correct the situations of child neglect.[195] Those soldiers were repeat offenders, had violated lawful orders and were charged with failure to obey a superior commissioned officer. The survey respondents provided examples of many of their cases involving egregious facts.[196]

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[194] *See* Appendix A, questions **2,** 8, 9.

[195] The situations of child neglect were: substandard living conditions; malnutrition; failure to clothe; and poor personal hygiene.

[196] Several survey respondents provided descriptions of cases from their installations. Several judge advocates reported cases when soldiers left dependent children alone in quarters while they were assigned TDY. One installation reported a dual military couple who left their two children in quarters alone for several weeks while they went on vacation. One installation reported a case where the military judge dismissed a child neglect specification under Article 134, both clauses 1 and **2,** based on *Wallace*. The case involved a parent who failed to obtain the necessary medical care for his abused child. Many installations reported egregious fact scenarios. For example, at one installation a child was discovered in government quarters strapped to a car seat, on the floor of a bedroom surrounded with substandard conditions.

A large majority of survey responses indicated that installations attempt to fill the gap with post regulations and policies. However, these regulations and policies differed from installation to installation and each installation's guidelines tended to focus on different parental requirements. Some installations had policies, while others had regulations. Some installations focused on supervision of minors, while others focused on safety. Some installations used words of criminality, but failed to provide appropriate notice to the soldiers.[197] Some supplemented the definition of child neglect already published in the Army's regulations. Within the category of supervision, some of the following elements differed within each post policy or regulation: authorized periods of unattendance; ages of the child; locations; and baby-sitter qualifications. In essence, a soldier could permanently change station and his parental responsibilities, as provided in installation policies or regulations, would drastically change.

Overall, survey responses reflected the many inconsistencies in the way the Army handles criminal child neglect and verified the need for unified standards.

V. Why the Military and Society Disregards Child Neglect

The survey reinforced that child neglect occurs in the military community. Although child neglect is more prevalent than child abuse nationally, and its consequences are as serious as abuse, media focus, political debate, and research and practice literature have concentrated on child abuse.[198] Moreover, three additional problems have prevented child neglect from becoming legally actionable. First, "state legislatures, courts, and societies historically tended to view psychological, intellectual, social, moral, and emotional injuries as nebulous and insignificant."[199] Furthermore, "lawmakers and judges hesitate to interfere with family autonomy."[200] Lastly, "[T]he mounting problem of physical abuse . . . casts a shadow of futility" over attempts to deal with the less immediate problem of child neglect.[201] However, these obstacles can, and should, be overcome.

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[197] *See* United States v. Blanchard, 19 M.J. 196, 197 (C.M.A. 1985). Some respondents provided copies of the installation regulations or policies; and other respondents summarized the terms within their installation regulation or policy. Most regulations or policy letters from respondents were not punitive and focused on supervision of children. *See* Appendix A, questions 6, 7, 12 (identifying common categories regulations and policy letters addressed).

[198] *See* Wolock, *supra* note 17, at 530.

[199] Kincanon, *supra* note 49, at 1043-44 (footnote omitted).

[200] *Id.*

[201] *Id.*

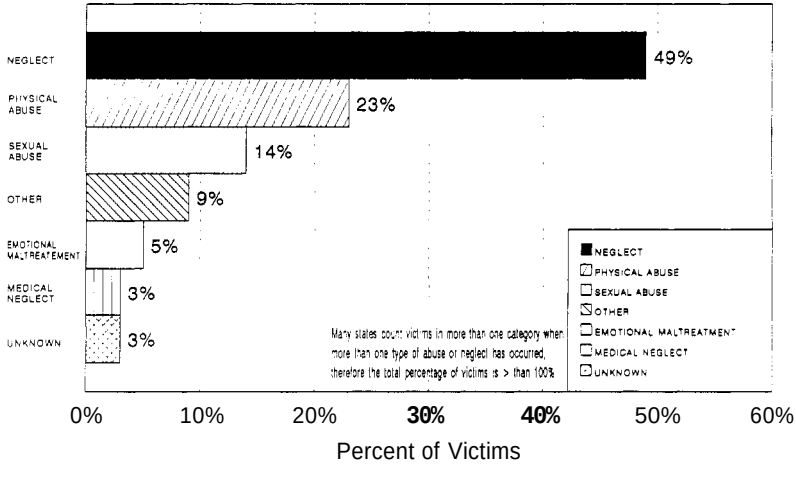
A. *Child Neglect Is Not a Nebulous and Insignificant Problem*

Child neglect is the predominant type of child maltreatment in our nation. Statistics indicate that it likewise is prevalent in the military community.

1. National Incidence of Child Neglect—The NCCAN reports that "[i]n 1992 there were nearly 1.9 million reports received and referred for investigation on approximately 2.9 million children who were alleged subjects of child abuse and neglect."[202] Furthermore, as depicted in Figure 2, with forty-nine states reporting, forty-nine percent of substantiated or indicated child victims suffered from neglect, three percent suffered from medical neglect, and five percent suffered from emotional maltreatment.203

NATIONAL STATISTICS 1992
VICTIMS BY TYPE OF CHILD ABUSE OR NEGLECT

FIGURE 2



TOTAL NUMBER OF VICTIMS=918,263 : 49 STATES REPORTING

The National Committee to Prevent Child Abuse estimated that in 1993, 2,989,000 children were reported for maltreatment, and forty-seven percent of those children, 1,404,830 children, were reported for neglect.[204] Additionally, of the 1299 children who died from maltreatment, forty-three percent of those deaths were due to neglect.[205]

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[202] CHILD MALTREATMENT 1992, ***supra*** note **115,** at 9. This total was based on reports from all ***50*** states and the District of Columbia.

[203] *Id.* at **14.**

[204] Resource Center Child Neglect Information Sheet, ***supra*** note 26.

[205] *Id.*

The National Resource Center on Child Abuse and Neglect estimates that eight of every 1000 children experience physical neglect, and 4.5 of every 1000 children suffer from educational neglect.[206] Furthermore, approximately three of every 1000 children are victims of emotional neglect.[207]

2. Incidence of Child Neglect in the Military Community—"A high proportion of American children are poor . . . ill-fed, poorly housed, and effectively cut off from decent medical attention and preventive health care."[208] This could account for the high rate of child neglect nationwide. So *what is the rate of child neglect in the military community where the government provides free medical care and housing?*

Unfortunately, the amount of child neglect present in the military is comparable to the occurrence rates nationwide.[209] Many parents in the military community are part of family structures that are more inclined to commit child neglect. For example, the military community includes many single parent military members, dual military parents, and young soldiers with poor parenting skills and with insufficient income to support their children.[210]

Single parents, who may find it more difficult to care for children, are common in the military community. Specifically, 5.7% of the Army and 4.3% of the Marine Corps are single parents.[211]

Many of the military members are young and lack parenting skills. Almost sixty-five percent of the military force is age thirty or younger, while only forty-five percent of the civilian workforce is under age thirty.[212] Moreover, with a DOD workforce consisting of 1,386,166 enlisted members, 218,379 are twenty years old or younger and 466,582 are between twenty-one and twenty-five years old.[213]

Young military members and single members, who are parents, depending on their "knowledge, experience, social supports, and environment,"[214] may be unable to "accurately assess the best

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[206] *Id.*

[207] *Id.*

[208] Coons, *supra* note 30, at 308.

[209] *See* CHILD MALTREATMENT 1992, *supra* note 115

[210] *See* BLANCHARD, PROTECTING CHILDREN, *supra* note **97,** at 9.

[211] In the other services, 5.59 of the Navy and **5.4%** of the Air Force are single parents. MILITARY DEMOGRAPHICS, *supra* note 112, at 35. The report in this area is based on 1992 statistics from the Defense Manpower Data Center. The majority of single parents are in the enlisted pay grades E5-E6 and then E7-E9. *Id.*

[212] *Id.* at 10. These statistics are based on 1994 figures.

[213] *Id.* These statistics are based on 1994 figures.

[214] Judith G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child,* 75 MARQ. L. REV. 569, 596 (1992).

interests of their children."[215] Depending on their background and rearing, some military parents may not understand their parental responsibilities.

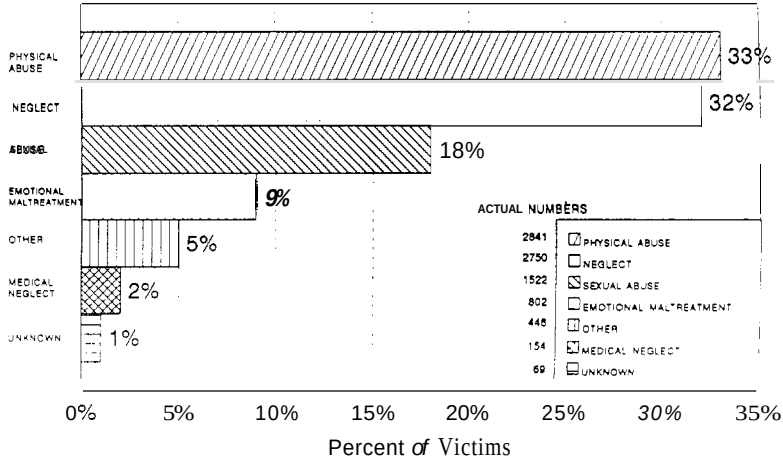
Notably, a majority of service members have children. In the armed forces, 28.6% of E l through E4, 61.1% of E5 through E6, and 73.7% of E7 through E9, have children.[216]

Moreover, the NCCAN reports that our "youthful organization" causes a number of risk factors in some military families, for example, the large amount of young military members (in low pay grades) with young spouses and children, who reside off post.[217] The NCCAN reports that these families are at high risk due to their: low pay (some may qualify for food stamps); limited home management skills; limited training in parenting; and isolation from extended family and military support organizations on post.[218]

Certain conditions in the military community cause an increase in poor parenting. Adverse conditions that affect parenting behaviors — such as physical, emotional, economic, or cultural stress — can cause a parent to become unable to meet the child's

VICTIMS BY TYPE OF CHILD ABUSE OR NEGLECT
ARMED FORCES--CONUS 1992

Figure 3



TOTAL NUMBER OF VICTIMS = 8,584

[215] *Id.*

[216] MILITARY DEMOGRAPHICS, ***supra*** note 112, at 31. The statistics in this area are based on 1992 information from the Defense Manpower Data Center. *Id.*

[217] BLANCHARD, PROTECTING CHILDREN, ***supra*** note 97, at 9.

[218] *Id.*

needs.[219] Adverse factors causing stress include long separations, frequent transfers, isolation from family and friends, lack of job choice, and high risk jobs.[220] All types of stress exist in a readily deployable military force that requires service members and their families to repeatedly and, at times, rapidly change station.

Whatever the causes, the military community has an extensive number of substantiated child neglect cases. As Figure 3 depicts, in calendar year 1992, of 8584 substantiated victims of child abuse, the armed services in the continental United States (CONUS) reported that 2750 were due to neglect, 154 suffered from medical neglect, and 802 were victims of emotional maltreatment.[221]

Furthermore, in 1992, OCONUS armed services reported 1853 substantiated victims of abuse and neglect, including 641 victims of neglect; 42 victims of medical neglect; and 218 victims of emotional maltreatment.222

Tables 1 through 4, are based on DOD statistics and reflect fiscal years (FY). Table 1 shows the trend in the number of substantiated child neglect cases in the military. As indicated, substantiated child neglect cases have remained high in each FY. Tables 2, 3, and 4 further depict the percentage of each type of maltreatment for FYs 1990, 1991, and 1992. Of the total substantiated reports of child abuse and neglect DOD wide, deprivation of necessities alone encompassed thirty-five percent in FY 1990; thirty-eight percent in

TABLE 1

DEPARTMENT OF DEFENSE
CHILD NEGLECT STATISTICS

FISCAL YEAR	CHILD POPULATION	TOTAL SUBSTANTIATED USES OF ABUSE-NEGLECT	TOTAL SUBSTANTIATED CASES OF DEPRIVATION OF NECESSITIES	TOTAL SUBSTANTIATED CASES OF EMOTIONAL MALTREATMENT	EMOTIONAL MALTREATMENT & NEGLECT AS % OF TOTAL
1986	1,580,886	7,904	2,465	410	36%
1987	1,574,677	10,060	3,020	727	37%
1988	1,566,190	9,378	3,012	1,039	43%
1989	1,572,219	10,336	3,876	1,127	48%
1990	1,580,494	9,696	3,382	1,063	46%
1991	1,707,327	10,552	3,993	912	46%
1992	1,643,669	10,251	3,227	1,023	41%

[219] McMullen, *supra* note 214, at 595.

[220] Dep't of Navy, Naval Military Personnel Command, subject: Navy Family Advocacy Program: The Role of the Commanding Officer 11 (1994) (text accompanying a slide/tape briefing on the Navy family advocacy program).

[221] CHILD MALTREATMENT 1992, *supra* note 115, at 42. Additionally, CONUS armed forces reported that 2841 were due to physical abuse and 1522 were due to sexual abuse. *Id.*

[222] *Id.* Emotional maltreatment includes both emotional neglect and emotional abuse. Additionally, OCONUS armed forces reported that 652 were due to physical abuse and 195 were due to sexual abuse (*see* *supra* note 115, accompanying text, and figure 1).

TABLE 2

TYPES OF SUBSTANTIATED CHILD ABUSE & NEGLECT
FISCAL YEAR 1990

	PHYSICAL INJURY	SEXUAL ABUSE	DEPRIVATION OF NECESSITIES	EMOTIONAL MALTREATMENT	MULTIPLE MALTREATMENT	TOTAL CHILD ABUSE 6 NEGLECT
TOTAL	3,772	1,259	3,382	1,063	220	9,696
% OF TOTAL	39%	13%	35%	11%	2%	100%

TABLE 3

TYPES OF SUBSTANTIATED CHILD ABUSE a NEGLECT
FISCAL YEAR 1991

	PHYSICAL INJURY	SEXUAL ABUSE	DEPRIVATION OF NECESSITIES	EMOTIONAL MALTREATMENT	MULTIPLE MALTREATMENT	TOTAL CHILD ABUSE & NEGLECT
TOTAL	3,824	1,424	3,993	912	399	10,552
% OF TOTAL	36%	13%	38%	9%	4%	100%

TABLE 4

TYPES OF SUBSTANTIATED CHILD ABUSE 6 NEGLECT
FISCAL YEAR 1992

	PHYSICAL INJURY	SEXUAL ABUSE	DEPRIVATION OF NECESSITIES	EMOTIONAL MALTREATMENT	MULTIPLE MALTREATMENT	TOTAL CHILD ABUSE & NEGLECT
TOTAL	3,957	1,618	3,227	1,023	426	10,251
XOF TOTAL	39%	16%	31%	10%	4%	100%

FY 1991; and thirty-one percent in FY 1992.223 Statistics support the contention that child neglect is not insignificant.

B. Intervention Does Not Disrupt Parental Autonomy

Once in agreement that child neglect is a significant problem and criminal statutes are necessary, lawmakers address concerns about disturbing family autonomy. The imposition of criminal liability for child neglect faces serious opposition among lawmakers and child protective agency practitioners. Like society, these officials face a dilemma involving the balancing interests of the child, the

223 DEP'T OF DEFENSE, DOD CHILD AND SPOUSE ABUSE STATISTICAL REPORT FOR FISCAL YEAR 1990 (Jan. 1991); DEP'T OF DEFENSE, DOD CHILD AND SPOUSE ABUSE STATISTICAL REPORT FOR FISCAL YEAR 1991 (Mar. 1992); DEP'T OF DEFENSE, DOD CHILD AND SPOUSE ABUSE STATISTICAL REPORT FOR FISCAL YEAR 1992 (May 1993). Tables 2, 3, and 4, were taken from these DOD reports. Neglect, as defined in this article, falls into two DOD categories listed: "deprivation of necessities" and "emotional maltreatment."

parent, and the state. States take different approaches with varying degrees of intervention; and, as a result, these responses to the problem of child neglect are inconsistent. Additionally, disagreement among lawmakers, who have different opinions about the acceptable level of state intervention, impedes a national or unified solution.

Opponents of criminal child neglect statutes voice constitutional concerns about these statutes. Opponents contend that government intervention violates the Fourteenth Amendment which prohibits any state from depriving "any person of life, liberty, or property, without due process of law."[224] Moreover, the Fourteenth Amendment protects both the parent's personal freedom and unfettered discretion to raise a child, and the child's right to live free from government intervention.

Constitutional issues also arise when lawmakers debate whether to enact a religious accommodation provision for parents who use prayer as medical treatment. Constitutional issues concerning the parent's right to free exercise of religion (and freedom from prosecution) and whether religious exemption statutes violate the Establishment Clause, also impede enacting criminal child neglect statutes.

To withstand judicial scrutiny, criminal child neglect statutes must not unduly and unjustifiably interfere with family autonomy and parental rights. State statutes must pass the United States Supreme Court's constitutional standard of review, balancing parent's rights with the state's authority to promote health and welfare of its citizens.[225]

The government attempts to protect children who are abused or neglected and, as a result, our society faces complex decisions about competing interests, values, and resources.[226] Although the Supreme Court has given parents broad discretion in raising children, neglected children are in danger and cannot help themselves. Therefore, the state's interest in protecting its minor citizens who are endangered should outweigh the parent's interest in family autonomy and parental rights.

Parental rights are rights parents have in controlling their children. Similarly, "family autonomy," a derivative of individual privacy, is the assumption that adult family members should be

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[224]U.S. CONST. amend. XIV, § 1.

[225]Kincanon, *supra* note 49, at 1053.

[226]Mindy S. Rosenburg & Robert D. Hunt, *Child Maltreatment: Legal and Mental Health Issues, in* CHILDREN, MENTAL HEALTH, AND THE LAW 79 (N. Dickon Reppucci & Lois Weithorn eds., 1984).

allowed to freely exercise their rights to privacy in family decision making, without state intervention.[227]

The furtherance of the public good or the balancing of individual and family interests sometimes force courts to compromise individual and family autonomy.[228] 'With progress in individual rights, the courts address two dominant ideals: (1) the right of the child to be free from the harm of abuse and neglect; and (2) the right of the American family to be free from undue government influence and interference."[229]

1. The Legal History *of* Parental Rights: Balancing the Fundamental Personal Liberties *of* Parents and Children — The Supreme Court has repeatedly reinforced society's deference to parental authority in all areas of child rearing, including educating and training their young.[230] In essence, deference to parental authority with respect to the care, custody, and control of children, supports society's fostering of "social pluralism and diversity."[231] Although not true in many instances, the importance of family autonomy and privacy is based on the assumption that "privacy strengthens families" and "parents will act in the best interests of their children."[232] Reflecting Western civilization's concepts that a family unit includes broad parental authority over children, the courts and "our constitutional system long ago rejected any notion that a child is 'the mere creature of the State' and, on the contrary, asserted that parents generally 'have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.'"[233]

In 1923, in Meyer *v. Nebraska,*[234] the Supreme Court announced that the "right of the individual . . . to marry, establish a home and bring up children"[235] was a liberty protected under the Due Process Clause of the Fourteenth Amendment.

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[227] McMullen, *supra* note 214, at 570.

[228] Peggy C. Davis, *Contested Images of Family Values: The Role of the State,* 107 HARV. L. REV. 1348, 1372 (1994).

[229] McGovern, *supra* note 16, at 207.

[230] Garrison, *supra* note 43, at 1770-71.

[231] *Id.* at 1770.

[232] McMullen, *supra* note 214, at 569.

[233] Parham v. J.R., 442 U.S. 584, 602 (1979) (citing Pierce v. Society of Sisters, 268 U.S. 510,535 (1925)).

[234] 262 U.S. 390, 399 (1923) (holding that a state statute forbidding the teaching of any language except English in the first eight grades, exceeded the power of the state and infringed on the liberties guaranteed under the Fourteenth Amendment).

[235] *Id.* at 399.

In **1925,** in Pierce *v.* Society *of Sisters*,[236] the Court reaffirmed this liberty interest by finding an Oregon statute requiring children to attend public schools unconstitutional. The Court held that the act unreasonably interfered "with the liberty of parents and guardians to direct the upbringing and education of children under their control."[237]

In **1944,** in Prince v. *Massachusetts*,[238] the Court again confirmed the existence of parental rights and responsibilities, but with limitations. Upholding a state child labor law and the conviction of a custodian of a minor who permitted the child to work contrary to the law, the Court recognized the private realm of family life while placing boundaries on "parental rights" and family autonomy." The Court stated that "the family itself is not beyond regulation in the public interest" and "rights of religion nor rights of parenthood are beyond limitation."[239]

Over twenty years later, in Griswold *v. Connecticut*,[240] the Court identified the "constitutional right to privacy" as further protection for parents and the family unit. Although not enumerated in the Bill of Rights, the Court stated that "penumbral rights of 'privacy and repose"' are "formed by emanations from those guarantees that help give them life and substance."[241] As Justice Goldberg stated in his concurring opinion, "The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected."[242]

However, in **1972,** in *Wisconsin v. Yoder*,[243] the United States Supreme Court verified the conditions on the "power of the parent."[244] The Court again authorized intervention when it appeared that parental decisions would "jeopardize the health or safety of the child, or have a potential for significant social burdens."[245]

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[236] 268 U.S. 510 (1925).

[237] *Id.* at 534-35. However, the Court decided both these cases during a time when the Court generally protected liberty interests.

[238] 321 U.S. 158 (1944).

[239] *Id.* at 166.

[240] 381 U.S. 479 (1965) (holding a Connecticut statute prohibiting use of contraceptives violated the right of marital privacy). See *also* Wisconsin **v.** Yoder, 406 U.S. 205 (1972) (holding that an Amish family's decision not to send child to high school was protected).

[241] *Griswold*, 381 U.S. at 484-85.

[242] *Id.* at 495 (Goldberg, J. concurring).

[243] *Yoder*, 406 U.S. at 205.

[244] *Id.* at 233.

[245] *Id.* at 234.

These cases establish that the Supreme Court has recognized "parental rights" and "family autonomy" throughout history, but not without limitations. The Court has allowed government intervention to infringe on fundamental liberties and rights of parents and children when the child needs state protection. The state may act "to guard the interest in youth's well being" and may act as "parens patriae" to restrict the parent's control.[246] Furthermore, "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare."[247]

The Court has placed boundaries on "family autonomy" and "parental rights" because parental interests include rights and duties, entitlements, and obligations. "The Supreme Court has given high priority to the right of parents to direct the upbringing of their children, but that very liberty has received constitutional protection in no small part because it also reflects the social responsibility of parents."[248]

Once parents fail to fulfill their obligations and parental responsibilities, the state's interest in protecting the neglected child outweighs the parent's interest in autonomy. Protection of family autonomy and individual privacy, although valuable, "should not mean that children must be stuck with the luck of the draw in having their needs fulfilled."[249] That child development and needs may be difficult to identify, should not prevent "society from requiring that all children have access to certain developmentally positive resources."[250] Accordingly, states have authority to intervene when parents fail to fulfill their obligations.

2. Medical Decision Making: Religious Freedom—One could contend that criminal child neglect statutes interfere with constitutionally protected religious freedom. However, twenty-one states and the District of Columbia have enacted various types of religious exemption statutes that exempt parents from criminal liability or provide a defense for child neglect offenses.[251]

During the 1960s, in conjunction with the establishment of child abuse reporting laws, several states enacted religious accom-

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[246]Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[247]*Id.* at 167. The Court further stated "and that includes, to some extent, matters of conscience and religious conviction." Id.

[248]Bruce C. Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests, 81 MICH. L. REV. 463, 475 (1983).

[249]McMullen, supra note 214, at 597.

[250]*Id.*

[251]Many jurisdictions also have religious exemption provisions for their civil protective statutes. However, this article only addresses such exemptions in criminal child neglect statutes.

modation statutes.[252] Between the 1970s and 1980s the federal government first encouraged exemptions and then changed its position.[253] Today, many jurisdictions still have provisions for prayer treatment. These statutes differ in approach and content, and use different descriptive language to explain acceptable religious treatment in lieu of medical treatment.

For example, several state religious accommodation statutes exempt parents from the category of potential offenders by including phrases such as the following: "a person does not commit nonsupport or endangerment if. . ."[254] or "there is no failure to provide medical care if . . . "[255] or "nothing under the definition of 'child endangerment' shall be construed to mean. . . ."[256] Other states provide religious healing as an affirmative defense to specific crimes. In Delaware, the religious accommodation provision is an affirmative defense to the crime of child endangerment,[257] while in Indiana, the religious accommodation provision is a defense to the crimes of criminal nonsupport258 and criminal neglect.[259]

Another difference among accommodation statutes is the language describing "acceptable" religious practices that can serve in lieu of medical treatment. Some states require religious healing "in accordance with tenets and practices of an established church or religious *denomination*"[260] or "a recognized church or religious *denomination.*"[261] Other states require healing "by adherents of a bona fide religious denomination that relies exclusively on this form of treatment in lieu of medical attention."[262] Some states require that an accredited practitioner conduct the healing;[263] and other

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[252]Christine A. Clark, ***Religious Accommodation and Criminal Liability,*** 17 FLA. ST. U. L. REV. 559, 564 (1990).

[253]In 1974, the federal Child Abuse Prevention and Treatment Act encouraged religious accommodation provisions in their guidelines, and granted funds to states enacting laws in accordance with those guidelines. Subsequently in 1987, the revised guidelines deleted the requirement for a religious accommodation provision. ***Id.*** at 564. ***See also*** Wadlington, ***supra*** note 43.

[254]***See*** ALA. CODE § 13A-13-6 (1994).

[255]***See*** ALASKA STAT. § 11.51.120 (1994).

[256]***See*** KAN. STAT. A". § 21-3608 (1993).

[257]DEL. CODE ANN. TIT. 11, § 1104 (1994).

[258]IND. CODE ANN. § 35-46-1-5 (West 1995).

[259]***Id.*** § 35-46-1-4. ***See also*** ARK. CODE ANN. § 5-10-101(a)(9) (Michie 1993) (a religious accommodation statute providing an affirmative defense to only capital murder resulting from a parent's failure to provide medical treatment).

[260]***See*** ARK. CODE ANN. § 5-10-101(a)(9) (Michie 1993).

[261]***See*** KAN. STAT. ANN. § 21-3608 (1993);***see also*** LA. REV. STAT. ASN. § 14:93(B) (1985)(requiringa "well-recognized religious method of healing").

[262]OR. REV. STAT. § 163.555 (1994).

[263]***See*** D.C. CODE ANN. § 2-1356 (1993).

states require that the defendant be an adherent or a member of the denomination.264

Whatever the statutory language, religious exemption statutes raise constitutional concerns. Lawmakers are concerned with two issues: (1) whether or not prosecuting parents who use religious treatment as a form of medical treatment violates the Free Exercise Clause; and (2) whether the statutory prayer exemptions to neglect statutes violate the Establishment Clause.

State exemption statutes discussed in this article are religious accommodation provisions for criminal statutes encompassing child neglect. When a child dies, and if there is a prayer treatment exemption for *only* the criminal child neglect statute or civil protective statute, some states prosecute parents under ***other*** criminal statutes, such as manslaughter, negligent homicide, or homicide.265 Opponents argue that prosecution is excessive government intervention into both a parent's right to free exercise of religion and parental freedom to use religious healing. In contrast, opponents of the religious accommodation statutes argue that religious healing exemptions violate the Establishment Clause as an impermissible government established religion.

These constitutional arguments involve the First Amendment to the United States Constitution which states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."266 The first half of this phrase is the Establishment Clause and the second half is the Free Exercise

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264 *See* W. VA. CODE §§ 61-8D-2, 61-8D-4 (1994). Furthermore, some states require that the defendant rely only on religious healing. These statutes include language such as: "treatment solely by spiritual means through prayer" VA. CODE ANN. § 18.2-371.1 (Michie 1994); or "medical attention provided by treatment by prayer through spiritual means alone." OR. REV. STAT. § 163.555 (1994). See COLO. REV. STAT. § 19-3-103 (1993) (requiring that the defendant legitimately practice treatment by spiritual means through prayer in accordance with a recognized method of religious healing). Colorado further states that the method is presumed recognized if either: the fees and expenses for the treatment are tax deductible under the Internal Revenue Service rules and those fees and expenses are reimbursable health care expenses under medical insurance from insurers the state has licensed; or the religious treatment has a success rate equivalent to medical treatment. Additionally, Colorado explicitly states that parents cannot limit the access of the child to medical care in "life-threatening situations" or conditions that will result in serious disability. *Id.*

265 *See* Walker v. People, 763 P.2d. 852 (Cal. 1988), cert denied, 491 U.S. 905 (1989); Hermanson v. State, 604 So. 2d 775 (Fla. 1992); Commonwealth v. Twitchell, 617 N.E.2d 609 (Mass. 1993). See *also* Wadlington, supra note 43; Clark, supra note 252.

266 U.S. CONST. amend. I.

Clause. Additionally, these First Amendment prohibitions, as incorporated by the Due Process Clause of the Fourteenth Amendment, apply to the states.[267]

In Establishment and Free Exercise Clause challenges, the state generally wins. Parents who claim that they are practicing the "free exercise of religion" are only protected to the extent the state allows; like parental rights, the right to free exercise of religion has limits. States can intervene when the child is facing life-threatening conditions. Under the Establishment Clause, the state can enact a religious accommodation statute if the statute does not excessively entangle church and state, and it fulfills the United States Supreme Court's three-prong test set out in *Lemon v. Kurtzman*.[268]

Embodied in the Free Exercise Clause are "the right to believe and the right to act in accordance with that belief."[269] States may not interfere with the right to believe, but may interfere with the right to act on that belief. The extent of permissible state intervention depends on the standard of judicial review of the statute.

The United States Supreme Court has, over time, changed the judicial standard of review for statutes interfering with religious freedom. In the 1960s and 1970s, the standard was strict scrutiny,[270] requiring the state to show that although burdening the free exercise of religion, it used "the least restrictive means of achieving a compelling state interest."[271] More recently, the Court, supporting the state's interest in the child's health and welfare, has turned to the less rigorous rational basis test.[272]

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[267] Laura M. Plastine, *"In God We Trust": When Parents Refuse Medical Treatment for Their Children Based upon Their Sincere Religious Beliefs*, 3 SETON HALL CONST. L.J. 123, 125 n.4 (1993) (citing Cantwell v. Connecticut, 310 U.S. 296 (1940)).

[268] 403 U.S. 602, 612-13 (1972); Clark, *supra* note 252, at 581 (citation omitted).

[269] Plastine, *supra* note 267, at 126.

[270] *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that regarding the law requiring public school attendance, Wisconsin was required to grant a religious exemption to the Amish religious denomination, unless state could demonstrate a compelling state interest). *See also* Sherbert v. Verner, 374 U.S. 398 (1963).

[271] Plastine, *supra* note 267, at 130.

[272] *See* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990) (holding that the state may restrict a person's right to act to support their religious beliefs and that the Free Exercise Clause did not require the state to provide an exemption, for citizens whose religious beliefs may conflict, from generally applicable criminal laws); Paula **A.** Monopoli, *Allocating the Costs of Parental Free Exercise: Striking a New Balance Between Sincere Religious Belief and a Child's Right to Medical Treatment*, 18 PEPP. L. REV. 319, 341 (1991)). Specifically, the Court rejected the respondent's claim for a religious exemption (for Native Americans) from an Oregon law prohibiting sacramental peyote use and denial of unemployment benefits to persons discharged for such use. Additionally, the Court found that the state statute did not call for a strict scrutiny review. The Court stated that "the right of

Regardless what standard of review courts use, the Free Exercise Clause will not necessarily bar the prosecution of "faith-healing" parents for failing to provide medical care to their children.[273] States have "a compelling interest in protecting children whose lives are in imminent danger, and prosecution is narrowly tailored to achieve that interest."[274] The Supreme Court has supported the state's ability to limit religious exemptions for certain criminal statutes, such as manslaughter, and has recognized that the right of the individual to act in support of religious beliefs is limited.[275] However, states have complied with the requests of many groups who practice prayer healing, by enacting religious exemptions to the criminal child neglect statutes.

States that have spiritual healing exemptions may allow exemption to criminal child neglect charges, but not necessarily to other crimes. Many states still take action by either declaring the child neglected and removing the child from the parent,[276] or if the child dies from refusal of medical treatment, the state can prosecute the parent for murder (citing the parent's violation of the endangerment statute as negligence).[277]

The first type of state action is an intervention based on the civil child neglect protective statutes, where the state acts as parens

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free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Employment Div., Dep't of Human Resources,* 494 U.S. at 879 (citation omitted). Additionally, the Court stated, 'We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 878-79. The Court affirmed its 1944 decision in Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding a criminal conviction of a Jehovah's Witness, a child's custodian, who gave the child pamphlets to distribute in violation of child labor laws). *Id.* This case and others have initiated a conservative trend that has reinstated the less rigorous rational basis standard of review. Plastine, *supra* note 267, at 137. However, one change that might cause a reinstatement of the strict scrutiny standard is the recently passed Religious Freedom Restoration Act. Codifying "strict scrutiny," this act explicitly prohibits any federal or state law from substantially burdening the exercise of religion without a compelling state interest and the least restrictive means. Jennifer L. Rosato, *Putting Square Pegs in a Round Hole: Procedural Due Process and the Effect of Faith Healing Exemptions on the Prosecution of Faith Healing Parents,* 29 U.S.F. L. REV. 43, 75 (1994) (citing 42 U.S.C.A. § 2000bb-1(a)-(b) (West Supp. 1994)).

[273] Rosato, *supra* note 272, at 76.

[274] *Id.* at 76.

[275] *See supra* note 272 (discussing applicable caselaw).

[276] "[T]he State can . . . remove the child from the parent's custody temporarily, placing the child in the custody of a guardian ad litem, who will order the necessary medical treatment for the child." Plastine, *supra* note 267, at 141.

[277] *Id.*

patriae.[278] Based on the priority of the preservation of a child's life, neither First Amendment Free Exercise Clause defenses, nor Fourteenth Amendment Due Process Clause "parental rights" contentions, are usually successful.[279]

State courts generally uphold "after the fact" criminal prosecutions. In these cases, states that have religious exemptions still may prosecute parents whose prayer treatment and inadequate medical care, resulted in their child's death. To some extent, the parents relied on the religious accommodations and it appears that the government permitted faith healing under one statute and criminally prosecuted under another when prayer treatment fails.[280] State prosecutions of these parents are facing challenges that the states are violating the defendant parents' Due Process rights by failing to give them notice of the criminal offense and their First Amendment Free Exercise rights. Although defendants argue that states are interfering with their free exercise of their religion, some courts have supported the state.[281]

The second constitutional concern about religious accommodation statutes is that these statutes may violate the First Amendment Establishment Clause. However, unless the statute specifically names a religion, this complaint is unsuccessful; "[w]hen government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact."[282]

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[278] *Id.* at 142. In these cases, the state, acting as parens patriae, intervenes with the parental decision and ensures that the child receives the required medical treatment. This usually occurs in cases where the "life of the child is in imminent danger" and the spiritual healing exemptions to the civil protective neglect statutes are deemed inapplicable. *Id.*

[279] *Id.* at 143.

[280] Judith I. Scheiderer, Note, *When Children Die as a Result of Religious Practices,* 51 OHIO ST. L.J. 1429, 1441-42 (1990).

[281] Furthermore, defendants contend that the exemptions, when read with the criminal statutes, "are unconstitutionally vague and do not give parents fair notice of their potential liability." Monopoli, *supra* note 272, at 350. In many cases, state courts have supported these prosecutions. The debate is beyond the scope of this article. For other articles about this conflict *see* John T. Gathings Jr., Comment, *When Rights Clash: The Conflict Between a Parent's Right to Free Exercise Versus His Child's Right to Life,* 19 CUMB. L. REV. 585 (1989); Scheiderer, *supra* note 280; Edward E. Smith, Note, *The Criminalization of Belief: When Free Exercise Isn't,* 42 HASTINGS L.J. 1491 (1991); J. Nelson Thomas, *Prosecuting Religious Parents for Homicide: Compounding a Tragedy?,* 1 VA. J. SOC. POL'Y & L. 409 (1994); Eric W. Treene, Note, *Prayer-Treatment Exemptions to Child Abuse and Neglect Statutes, Manslaughter Prosecutions, and Due Process of Law,* 30 HARV. J. LEGIS. 135 (1993).

[282] Gillette v. United States, 401 U.S. 437 (1971). The two types of prohibited legislation under this constitutional proscription are: those laws providing all religions one uniform benefit; and those that discriminate between religions. The first group must pass the three-part Lemon test, while the second must not provide preferential treatment to any one particular denomination. Unless they grant accommodation specifically to one denomination, most religious accommodation statutes can pass both of these standards. Monopoli, *supra* note 272, at 345.

According to the test the Supreme Court announced in *Lemon v. Kurtzman*[283] for excessive government interference, religious accommodation statutes must: **(1)** have a secular purpose; **(2)** neither advance nor inhibit religion; and **(3)** must not foster excessive entanglement.284 Based on these requirements, state religious accommodation statutes do not violate the Establishment Clause. Religious accommodation statutes, in general, have a secular purpose because they are designed to guarantee "fundamental first amendment rights,'' and therefore, "[D]o not contravene the establishment clause."[285] These statutes do not establish or endorse religion, but "serve to distinguish the intent traditionally associated with child abuse from the intent of parents who simply choose one form of treatment over another."[286] Exemption statutes ensure equal treatment of parents who choose either medical or spiritual health care, while criminally punishing parents who commit willful neglect or maltreatment of children.[287]

Lastly, religious accommodation provisions do not foster excessive entanglement and do not require an intrusion into either church or state. When the courts inquire into the defendant's religious practices, it does not involve "prohibited entanglement through administrative schemes or intrusion into church doctrine."[288]

Although constitutionally valid, states should not include these religious accommodation provisions within the criminal child neglect statutes or, in the alternative, the states should clarify the statutes. Exemptions create expectations of immunity and due process arguments.[289] Justifiably, the National District Attorneys Association advocates against religious exemptions for child abuse crimes.[290]

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[283] 403 U.S. **602** (1971).

[284] *Id.*

[285] Clark, supra note **252,** at **581** (citing Wallace v. Jaffree, **472** U.S. **38, 83** (1985) (O'Connor, J., concurring)).

[286] *Id.* at 581.

[287] *Id.* at 582. However, there may be a valid concern if the religious accommodation statute indicates a preference for one denomination. For example, prayer healing exemptions only for parents that either: have a "duly accredited practitioner" treat the child in lieu of medical treatment; or who are members of a "recognized" religion; or who are members of a "denomination," may not withstand direct constitutional challenge. Only specific religions can fulfill these requirements, and as a result, the statutes indicate a preference. Id. at **582-83.**

[288] *Id.* at 584. But see Scheiderer, supra note **280.**

[289] Scheiderer, supra note **280,** at **1445.**

[290] *Resolution* Concerning Child Abuse and Neglect, National District Attorneys Association (July **24,** 1994).

C. **A** Difficult Problem, But Not Futile: **A** Comparison of State Criminal Statutes

Aside from constitutional hurdles, society, lawmakers, and judges tend to focus on child abuse rather than neglect. Although child abuse appears a more immediate concern, states also have addressed child neglect in criminal statutes. Some lawmakers may feel that child neglect is a "futile problem," but there is extensive state legislation criminalizing child neglect.

1. Why Should Child Neglect Be *Criminalized?*—State legislatures have recognized that child neglect is not so "nebulous" to preclude its criminalization.291 States have implemented criminal sanctions for child neglect for the following reasons: the availability of punitive action may deter others and reduce the incidence of child neglect; there is a need to punish the offenders; and to address a prevalent offense involving a victim, with documented adverse or potentially adverse effects.

Since the early twentieth century, child protection reformers have increasingly relied on the judicial and law enforcement systems.[292] From the juvenile courts terminating parental rights to state agencies enforcing mandatory reporting laws, child protection advocates have looked to the law for assistance.[293] Following the "rehabilitative" ideals of the 1970s, the 1980s brought a growing "retribution movement" in the area of child protection; and with that came increased emphasis on prosecution and adversarial intervention.[294]

Even if prosecution never occurs, the ability to charge the offender is an option that most child protection advocates favor. The presence of legal authority, mandates, and potential intervention, are "sometimes necessary to disturb the dysfunctional family balance and mobilize the neglectful parent to change neglectful practices."[295] Threat of legal action is sometimes necessary to obtain cooperation and "to overcome the initial denial and apathy of the neglectful parent."[296]

Both the civil protective laws and the criminal statutes relating to child neglect are directed at two common goals: "to protect the child from harm by deterring or reforming misconduct, and to

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[291] *See supra* notes **203-23** and accompanying text.

[292] *See* Myers, *supra* note 45.

[293] *Id.* at 149.

[294] *Id.*

[295] Gaudin, *supra* note 5, at **72.**

[296] *Id.*

express community outrage at parental misconduct."[297] Criminal statutes operate as a "system of moral education and socialization. The Criminal law is obeyed not simply because of the legal threat underlying it, but because the public perceives its norms to be legitimate and deserving of compliance."[298] In any case, both civil and criminal statutes represent societal and legislative recognition of the victimization of children.

a. This Is Not a Victimless Crime: Effects on the Child— State legislatures, like society, have come to recognize that child neglect adversely affects children. Numerous studies indicate that child neglect (deprivation of necessary food, shelter, clothing, medical care, education, and supervision education), depending on the child's stage of development, will cause adverse physical, intellectual, and social and behavioral (including psychological adjustment) effects.[299] Deprivation of necessities from a child, can result in malnutrition, illness, and death. Furthermore, neglect, or deprivation of necessities, will affect children differently, depending on the child's needs for development at the time, and what the parent fails to provide. Typically, children who are victims of neglect may risk injury, become insecure, develop poor self-images, and become withdrawn or very disruptive.[300]

Research supports the finding that infants are especially vulnerable and child neglect adversely impacts the complete physical well-being of the child, especially during infancy.[301] Infants need more stimulation and parental care; "nutritional or psychosocial deprivation," may cause "failure to thrive" syndrome,[302] which eventually can cause death. Failure to thrive syndrome is "manifested by a significant growth delay with certain postural (poor muscle tone, unhappy facial expressions, persistence of infantile postures) and behavioral signs (minimal smiling, decreased vocalizations, general unresponsiveness)."[303]

b. Child Neglect Is Conduct "Prejudicial to the Good Order and Discipline of the Armed Forces"—*In* addition to all the reasons for which legislatures have enacted criminal child neglect

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[297] IJA-ABA **STANDARDS**, *supra* note 19, at 180.

[298] John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American* **Law,** 71 B.U.L. REV. 193 (1991) (footnote omitted).

[299] Julie L. Crouch & Joel S. Milner, *Effects of Child Neglect on Children*, 20 CRIM. JUS. & BEHAV. 49, 49-62 (1993).

[300] CHANNING L. BETE CO., WHAT EVERYONE SHOULD KNOW ABOUT CHILD NEGLECT 4-5 (1995).

[301] *See* Crouch & Milner, *supra* note 299, at 53.

[302] *Id.*

[303] *Id.*

laws, the military has an another reason to address child neglect. The military has an interest in maintaining a high level of morale, discipline, and readiness. Punitive sanctions — like the military justice system itself — promote justice and further discipline, readiness, and morale. "Indeed, unlike the civilian situation, the Government is often employer, landlord, provisioner, and lawgiver rolled into one."[304]

The DOD Family Advocacy Program illustrates that the armed forces recognize the adverse impact family problems have on "personnel and mission readiness, retention and overall quality of life."[305] However, military family advocacy programs minimally affect unit command and control and force readiness and discipline.

In the armed forces, punitive sanctions not only serve as retribution, but also are vital to preventing recurrence and putting service members on notice as to responsible standards of parenting. "The armed forces have long recognized that the object of any criminal law is not alone to punish the offender or wreak revenge upon him for the harm he has done but to provide such a penalty as will deter or discourage others from committing the acts prohibited."[306]

Unlike civilian occupations, military service requires "a higher standard of duty, obedience and discipline"[307] and a service member's "privacy and freedom must be restricted to some extent."[308] Discipline is necessary in peacetime "to make the most of our training" and "to perform our assignments efficiently, to carry out our occupation responsibilities."[309] "Military discipline does not necessarily mean punishment . . . it is the state of order and obedience among military personnel resulting from harmony. It pervades the life of a serviceman from courtesies of daily association to the assault on the battlefield. *It wins battles.*"[310]

The military services recognize the impact that families have on unit readiness and discipline. Laws, regulations, and programs — such as government family housing, living and travel allowances, and medical, legal, child care, abuse prevention, and morale, welfare, and recreation services — reflect the military's interest in the welfare of soldiers and their families.[311] As part of

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[304] **Parker v.** Levy, 417 U.S. 748, 752 (1974).

[305] DOD Fact Sheet, *supra* note 15.

[306] 4 MORRIS O. EDWARDS & CHARLES L. DECKER, THE SERVICEMAN **AND** THE LAW 23 (6th **ed.** 1951).

[307] *Id.* at **4.**

[308] *Id.*

[309] *Id.* at 11.

[310] *Id.* at 136.

[311] DEP'T OF ARMY REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY. AND PATERNITY, para. 1-5a (1 Nov. 1994) [hereinafter **AR** 608-99].

deployment preparation, military services require single parent service members and dual military couples with dependent family members to submit family care plans[312] that identify who will take custody of dependents. Care and supervision of children while service members are "deployed, TDY, or otherwise not available," significantly affect "mission, readiness, and deployability needs."[313]

In further recognition of the family's impact on readiness, the Army established the Total Army Family Program[314] to address quality of life issues. The program reflects the high value that the Army places "on both military and personal preparedness'' and that "[c]ommanders have an obligation to provide assistance to establish and maintain personal and family affairs readiness."[315]

The Army also has promulgated punitive regulatory provisions requiring soldiers to provide financial support for their families.[316] The Army's policy recognizes that because of the military's transient nature, a uniform standard is needed in the area of financial family support.[317] The Army recognizes that a soldier's failure to support family members not only affects readiness, morale, and discipline, but also may be service discrediting.[318]

Child neglect, like all family problems, "disrupts families, drains scarce resources, and reduces the readiness capability of involved military members."[319] Commanders begin to monitor this potential problem with family care plans, especially crucial for deployable soldiers.[320] Child neglect adversely affects unit morale, welfare, and discipline. Moreover, the military family's health, welfare, and morale have a direct impact on the service member's ability to perform assigned duties.[321] Child neglect is "incompatible with the high standards of professional and personal discipline required"[322] of service members.

To maintain discipline the military, like most states, needs a standard for criminal child neglect in addition to child protection laws and agencies, such as family advocacy programs. When the

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[312] *See* AR 600-20, ***supra*** note 187, para. ***5-5*** (102, 1Apr. 1992).

[313] *Id.*

[314] *Id.* para. 5-10 (102, 1Apr. 1992).

[315] *Id.* para. 5-10 (102, 1Apr. 1992).

[316] *See* AR 608-99, ***supra*** note 311, paras. 2-5, 2-9.

[317] *Id.* para. 1-5c.

[318] *Id.* para. 1-5d.

[319] Fact Sheet, Dep't of Air Force, subject: Air Force Family Advocacy Program (1994) [hereinafter Air Force Fact Sheet].

[320] *See* AR 600-20, ***supra*** note 187, para. ***5-5.***

[321] Air Force Fact Sheet, ***supra*** note 319.

[322] MCO 1752.3A, ***supra*** note 67, para. 4a.

case of a first-time offender deserving punishment occurs, the military "cannot divert its efforts from the main task of training the many to the task of reforming the few."[323] Without uniform guidance and punitive options in the area of parental responsibility, service members do not have notice of the requirements and commanders are less able to maintain readiness and discipline.

2. State Criminal Child Neglect Statutes *Compared*—Depending on their duty assignment in any of the fifty states or the District of Columbia, service members are subject to various laws defining neglect, both for criminal sanctions and the civil termination of parental rights.[324] The District of Columbia and forty-four states have promulgated criminal child neglect statutes. Six states remain without any criminal legislation for child neglect.[325] Most states criminalize conduct pertaining to a parent or caretaker's failure to provide a child's basic necessities.

Overall, jurisdictions vary widely in defining child neglect offenses. Chart 1, located at the end of this article, reflects the diverse statutory provisions denoting the criminal conduct of child neglect. State criminal provisions for this conduct are as diverse as their definitions of the terminology within the provisions.

Although state statutes focus on the conduct of parents, guardians, caretakers, and other persons in loco parentis, these statutes do not use the same definition when defining who the statute is protecting. For example, one major difference between all state criminal child neglect statutes is the definition for the term "child."[326] Some states even define the term "child" with different

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[323] EDWARDS, *supra* note 306, at 23.

[324] State civil rules describe child neglect as a basis for state actions such as. initiating child protective services, establishing reporting requirements for professionals, and terminating parental rights. The civil laws are inconsistent from jurisdiction to jurisdiction and the grounds for a determination of neglect vary widely McGovern, *supra* note 16, at 207 (an extensive and thorough review of the civil state statutes). Within the civil statutes

> [t]he definition of neglect changes from state to state. What may be defined as *neglected child* in West Virginia may be *abuse* in Colorado, *harm* in Oklahoma, *deprived child* in North Dakota, or none of the above in Massachusetts. These civil statutes determine the grounds for state intervention for child's removal from the home, termination of parental rights, and mandatory child abuse and neglect reporting requirements.

Id. at 214.

[325] As of 1 January 1995, the following states did not have criminal statutes for neglect offenses: Maryland, Michigan, North Dakota, South Dakota, Washington, and West Virginia.

[326] The ages in the state criminal statutes range from under six years old to under 18 years of age or under 21 years of age if the child is mentally or physically handicapped. The DOD defines a child as:

age requirements depending on the particular child neglect statute.[327]

State criminal codes further differ in focus. Some states focus on subjective parental responsibilities and omissions ("subjective statutes"), while others focus on the consequences of the parent's failure to act ("consequential statutes").[328]

The "subjective" statutes focus on the mens rea, the mental state of the accused, to determine blameworthiness; a parent who "knowingly fails to provide"[329] or who "willfully omits, without lawful excuse, to perform any duty imposed by law to furnish necessary food, clothing, shelter, monetary child support, or medical attendance."[330]

The "consequential" statutes center on the effects on the child. These statutes include phrases such as, "under circumstances creating substantial risk of physical injury," or "deprivation harms or is likely to substantially harm the child's physical, mental or emotional health,"[331] or "[neglecting] a child so it adversely affects the child's health and welfare."[332]

Some states combine "subjective" and "consequential" statutes into one criminal offense. For example, in Ohio, parents commit child endangerment if they "create a substantial risk to health or

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a person under 18 years of age for whom a parent, guardian, foster parent, caretaker, employee of a residential facility, or any staff person providing out-of-home care is legally responsible. The term "child" means natural child, adopted child, stepchild, foster child, or ward. The term also includes an individual of any age who is incapable for self-support because of a mental or physical incapacity.

DOD DIR. 6400.1, *supra* note 14, encl. 2, para. 3.

[327] *Compare* ALASKA STAT. § 11.51.100 (1994) (child abandonment statute requiring that the child be under 10 years of age) *with* ALASKA STAT. § 11.51.120 (1994) (criminal nonsupport statute requiring that the child be under 18 years of age).

[328] Major William Barto, Professor, Criminal Law Department, The Judge Advocate General's School, United States Army, Charlottesville, Virginia, provided the titles for these classifications. "Consequential" statutes also are known as "result-oriented" crimes. **See** Arthur Leavens, **A** *Causation Approach to Criminal Omissions*, 76 CAL. L. REV. 547, 548 (1988).

[329] *See* MO. ANN. STAT. § 568.040 (Vernon 1994) (criminal nonsupport statute providing "a person commits the crime of nonsupport if he knowingly fails to provide'').

[330] OKLA. STAT. ANN. tit. 21, § 852 (West 1995).

[331] *See* MINN. STAT. ANN. § 609.378 (West 1995). This statute combines consequential and subjective, by requiring that the defendant "willfully deprive." *Id.* **See** *also* ARK. CODE ANN. § 5- 27-204 (Michie 1994) (consequential statute, prohibiting "conduct creating a substantial risk of serious harm to the physical or mental welfare").

[332] TENN. CODE ANN. § 39-15-401 (1994).

safety of a child by violating a duty of care, protection or support."[333]

State criminal codes for child neglect can be further classified into the following categories: child endangerment, child abandonment; criminal nonsupport or deprivation; child abuse (combined statutes); failure to take action to prevent abuse; and miscellaneous. States may have statutes from some or all six groups. Within the groups, the statutes remain "subjective," "consequential," or a combination. Whatever the categories, no two state criminal statutory systems prohibiting child neglect are identical. State criminal child neglect laws are inconsistent, imprecise, and because of the diversity, fail to notify the service member of potential prosecution.

The focus of criminal child neglect statutes should be different in each type of statute; a model statute would include a provision for child endangerment, child abandonment, and criminal nonsupport or deprivation. The provisions should not focus on actual harm to the child, but on the likelihood of adverse impact on the child.

a. Child Endangerment — Within the child endangerment grouping, state criminal child neglect statutes tend to focus on whether the parent placed the child in some danger. Some states prohibit a parent from "knowingly causing or permitting" or "knowingly engaging in conduct causing" the child to be endangered, or creating a "substantial risk of some harm." However, these statutes use various mens rea requirements, along with different descriptive language to define what must be endangered (such as injury to health, moral welfare to be imperiled, life or limb to be endangered).

For example, in Arkansas, endangerment prohibits one from knowingly engaging in conduct creating a substantial risk of serious harm to the physical welfare of a known minor.[334] In Indiana, a person who knowingly or intentionally *places* his or her dependent in a situation that may endanger life or health commits an offense.[335] Maine uses a completely different approach to child endangerment; a person is guilty of endangering the welfare of a child if the person recklessly endangers health, safety or welfare of a child, by violating a duty *of* care *or protection.*[336]

In some states, a parent commits endangerment even if another person commits the act. In Alabama, a parent who directs

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[333]OHIO REV. CODE ANN. § 2919.22 (Anderson 1993); 1994 Ohio Legis. Bull. 162 (Anderson). ***See also*** HAW. REV. STAT. ANN. § 709-904 (Michie 1994).

[334]ARK. CODE ANN. §§ 5-27-203, 5-27-204 (Michie 1994).

[335]IND. CODE ANN. § 35-46-1-4 (West 1995).

[336]ME. REV. STAT. ANN. TIT. 17-A, § 554 (West 1994).

or authorizes a child "to engage in an occupation involving substantial risk of danger to life or health" commits an offense.[337] Under Arizona law, a parent is prohibited from knowingly causing or permitting a child's life to be endangered, health to be injured, or moral welfare to be imperiled by neglect, abuse, or immoral associations.[338] In Hawaii, a parent who intentionally, knowingly, or recklessly allows another to inflict serious injury or substantial bodily injury on a child commits child neglect in the form of endangerment.[339]

Statutes classified under the child endangerment category generally are designed to punish parents who place their children in perilous situations.[340] Under child endangerment, a parent commits neglect (i.e., child endangerment) by placing a child in a situation that has the potential to harm or injure the child.

A model child endangerment statute should state "willfully, negligently, or recklessly cause or permit the person or health of the child to be injured, or to be placed in a situation that its person or health is endangered or is likely to be endangered." This statute combines California's phrase "causes or permits the person or health of the child to be injured, or willfully causes or permits that child to be placed in a situation that its person or health is endangered,"[341] with Virginia's lower criminal state of mind requirement, "willfully or negligently" cause or permit.[342]

The combination of elements creates a viable child endangerment statute. Parents would be criminally liable for negligently placing their children in perilous situations where the child's person or health is injured, endangered, or is likely to be endangered. Therefore, parents may be criminally liable for conduct that results in potential harm to the child.

b. Child Abandonment Statutes — This category highlights the inconsistency and lack of uniformity among criminal child neglect statutes. Several states have enacted statutes criminalizing

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[337] ALA. CODE § 13A-13-6 (1994).

[338] ARIZ. REV. STAT. ANN. § 13-3619 (West 1994).

[339] HAW. REV. STAT. §§ 709-903.5, 709-904 (Michie 1994).

[340] *See* CAL. PENAL CODE § 273a(b) (West 1995) (prohibiting willfully causing or permitting a child to be "placed in a situation that its person or health is endangered"); VA. CODE ANN. § 40.1-103 (Michie 1994) (prohibiting willfully or negligently causing or permitting a child's life to be endangered or child's health to be injured, or willfully or negligently causing or permitting a child to be placed in a situation that endangers life, health, or morals). Ideally, a model child endangerment statute would combine specific language from both California and Virginia statutes.

[341] *See* CAL. PENAL CODE § 273a (West 1995).

[342] *See* VA. CODE ANN. § 40.1-103 (Michie 1994).

a parent's failure to supervise their child. Typically, abandonment statutes create a criminal offense for a parent to "desert" a child "with intent to abandon"[343] or to "wholly abandon"[344] or "to willfully and voluntarily physically abandon with the intention of severing all parental or custodial duties or responsibilities."[345]

Other states make it unlawful to "leave a child unattended to his [or her] own care" when "the defendant did not intend to return or provide adult supervision."[346] Still others make it unlawful to "abscond"[347] or "falsely leave a child to an orphanage"[348] or "fail to care for and keep the child so the public is forced to maintain the child."

Some states have other unique provisions under the child abandonment category;[349] Texas prohibits "intentionally or knowingly leaving a child under seven years of age, in a motor vehicle for longer than five minutes unattended by someone fourteen years old or over."[350]

Within this category, Illinois has enacted the most notable abandonment statute. The Illinois statute states that child abandonment is committed when a parent, without regard for the mental or physical health, safety or welfare of that child, knowingly leaves the child who is under the age of thirteen without supervision by a responsible person over the age of fourteen for twenty-four hours or more.[351] The statute lists factors that the trier of fact must consider in determining whether the defendant committed the offense without regard for the mental or physical health, safety or welfare of the child. The factors listed include: the child's age; location where the child was left; the child's special needs; how far away the parent was; whether the child was restricted in any way (locked

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[343] *See* CAL. PENAL CODE § 271 (West 1995); HAW. REV. STAT. § 709- 902 (Michie 1994).

[344] *See* ALA. CODE § 13A-13-5 (1994).

[345] GA. CODE ANN. § 16-5-72 (1994).

[346] *See* LA. REV. STAT. ANN. § 14:79.1 (West 1995).

[347] *See* MASS. GEN. LAWS ANN. ch. 119, § 39 (West 1995) (parent who makes a contract for a child's board and maintenance, but absconds, commits abandonment].

[348] *See* CAL. PENAL CODE § 271a (West 1995).

[349] D.C. CODE § 22-901 (1973), originally enacted in 1885, and in effect until August 1994 when it was repealed, criminalized the "disposing" of a child "with a view to its being employed as an acrobat, or a gymnast, or a contortionist, or a circus rider, or a rope-walker, or in any exhibition of like dangerous character, or as a beg gar, or mendicant, or pauper, or street singer, or street musician." Today the District of Columbia Code prohibits torturing, beating, or willfully maltreating a child, or injurious conduct. *Id.* § 22-901 (1994).

[350] *See* TEX. PENAL CODE ANN. § 22.10 (West 1994).

[351] 720 ILL ANN. STAT. ch 720, § 5/12-21.5 (1994).

in); whether food, provisions, and emergency phone numbers were left; and other related factors.[352]

Although the Illinois statute requires that the parent leave the child unsupervised for at least twenty-four hours, the statutory language is the most comprehensive. The Illinois statute provides for the trier of fact to review all the facts in each case and allows for a case by case determination of an offense. Other states, which require intent to permanently abandon the child, fail to address a large majority of the "home alone" offenses occurring throughout the country. Additionally, those states are disregarding the potential harm that may occur and the emotional harm a child who is left alone for a finite period may suffer.

c. Criminal Nonsupport or Deprivation Statutes — Within this category, states consistently provide a criminal offense for parental failures to provide necessities. States require "a failure to provide" or that the defendant "willfully or negligently deprived or allowed to be deprived" or "willfully omits." The differences among the statutes are: what the parent must provide; whether the states take into account the defendant's ability to provide; and whether harm must result from the nonsupport or deprivation.

Most state statutes in the nonsupport or deprivation category identify the offense with a failure to provide necessary food, shelter, clothing.[353] Other states add "medical or health care"[354] or "education as required by law"[355] or "supervision."[356] Many include financial support in the definition of support. Some include phrases exempting individuals who are unable to provide. To allow for inability, statutes include the following: "which he can provide"[357] or "without lawful excuse"[358] or "is able by means of property or capacity for labor."[359] Including these phrases keeps the impoverished out of the realm of possible offenders. Lastly, some statutes add a requirement of "likely to substantially harm"[360] or "persistently fails,"[361] criminalizing only egregious failures to provide for children.

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[352] 720 ILL. ANN. STAT. ch 720 § 5112-21.5 (1994).

[353] *See* CONN. GEN. STAT. A". § 53-20 (West 1995); D.C. CODE A". § 22-902 (1994).

[354] *See* ALASKA STAT. § 11.51.120 (1994); CAL. PENAL CODE § 270 (West 1995); MINN. STAT. A". § 609.378 (West 1995); MO. A". STAT. § 568.040 (Vernon 1994).

[355] *See* ALASKA STAT. § 11.51.120 (1994); IND. CODE ANN. § 35-46- 1-4 (West 1995); N.J. STAT. ANN. § 9:6-1 (West 1995).

[356] *See* MINN. STAT. A". § 609.378 (West 1995).

[357] *See* HAW. REV. STAT. § 709-903 (Michie 1994).

[358] *See* ALASKA STAT. § 11.51.120 (1994).

[359] *See* ME. REV. STAT. ANN. tit. 17-A, § 552 (West 1994).

[360] *See* MINN. REV. STAT. § 609.378 West 1995).

[361] *See* HAW. REV. STAT. § 709-903 (Michie 1994).

To gain the benefits of all those categorized in the criminal nonsupport or deprivation group, a model statute must provide for the failure to provide food, care, clothing, shelter, medical attention, and education. The words, "negligently deprive or allow a child to be deprived of"[362] should be included. Ideally, the statute should prohibit one from willfully, negligently, or allowing a child to be deprived of necessary food, clothing, shelter, medical attention, and education.

The remaining three categories are minor groups of statutes that few states have enacted. Statutes within the failure to take action to prevent abuse category criminalize the failure to act. The child abuse combined statutes combine child neglect into the definition of abuse. The miscellaneous category is comprised of statutes that prohibit exposing children to hazards or dangers, cruelty, or some other specific state offense. Chart 1 clarifies each category and indicates which jurisdictions have enacted statutes in the various categories.

Because so many diverse state statutes are enforced across the country, defining the crime of child neglect and notifying the military member becomes even more difficult. The lack of uniformity among states and the lack of a uniform, national standard to determine when a child is neglected, makes understanding what actions or omissions constitute neglect difficult.[363] The military should subject service members to the same requirements for parental responsibilities in each jurisdiction.

3. *Are Criminal Child Neglect Statutes Void for Vagueness?*— Although the statutory language of the criminal child neglect statutes may appear vague or ambiguous to the lay reader, they withstand the constitutional challenge of "void-for-vagueness." States appear to constantly change criminal child neglect statutes. Once a statutory term or phrase is successfully challenged as "vague," the legislature amends the criminal statute to either remove or change the terms or phrases. Furthermore, courts usually find that these statutes are not void for vagueness based on the facts of each case. Prosecutors primarily enforce criminal child neglect statutes against parents who grossly neglect their children and involve the most egregious circumstances. Hence, reported opinions of statutes withstanding constitutional challenges involve a defendant's conduct that was clearly criminal. Judges are able to find that the defendant "knew" such conduct was criminal.

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[362] *See* FLA STAT. ANN. § **827.05** (West 1995).

[363] McGovern, *supra* note 16, at 214.

a. The Supreme Court's Void for Vagueness Standard—The basis for the constitutional challenge of "void-for-vagueness" is the standard that the Due Process Clause of the Fourteenth Amendment prohibits prosecution under vague statutes. Vague statutes do not clearly define the illegal conduct and fail to provide fair warning or either constructive or actual notice; and as a result, may promote "arbitrary enforcement."[364] These laws may not warn the innocent and impermissibly delegate policy matters "to policemen, judges, and juries" to resolve in a subjective, ad hoc manner.[365]

In *Connally v. General Construction Co.*,[366] the Supreme Court explained to avoid vagueness a penal statute "must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties."[367] Furthermore, "a statute which forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[368]

The United States Supreme Court has stated that the standard in deciding vagueness challenges is whether the statute or ordinance: (1) gives a person of ordinary intelligence fair notice that his or her future conduct is prohibited; and (2) whether it "encourages arbitrary and erratic arrests and convictions."[369] A law is vague "if its prohibitions are not clearly defined."[370]

Courts must review criminal statutes more closely because "when a statute imposes criminal penalties or burdens constitutionally protected rights, a heightened requirement of fair warning applies."[371] A criminal law must define the offense "with sufficient definiteness that ordinary people can understand what conduct is

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[364] J. Nelson Thomas, Prosecuting Religious *Parents for* Homicide: *Compounding a Tragedy?*, 1 VA J. SOC. POL'Y & THE LAW 383, 432 (1994). See *also* Scheiderer, ***supra*** note 280, at 1441.

[365] ***See*** Grayned v. City of Rockford, 408 U.S. 104, 109 (1972). The Court did noted, however, that "[clondemned to the use of words, we can never expect mathematical certainty from our language."Id.

[366] 269 U.S. 385 (1926).

[367] *Id.* at 391.

[368] *Id.*

[369] Papachristou v. City of Jacksonville, 405 U S. 156, 162 (1972).

[370] *Grayned*, 408 U.S. at 108.

[371] Clark, ***supra*** note 252, at 584 (citing Village of Hoffman Estates v. Flipside, 455 U.S. 489,498-99 (1982)).

prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[372]

Although actual notice to citizens is important, the more important aspect of the vagueness doctrine is that the "'legislature establish minimal guidelines to govern law enforcement.'"[373] As the Court has stressed, legislation must meet "constitutional standards for definiteness and clarity."

In 1988, the Court made it more likely that criminal child neglect statutes would withstand constitutional challenges. Specifically, in Maynard *v. Cartwright*,[374] the Court said:

> Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts at hand; the statute is judged on an as-applied basis.[375]

Accordingly, when claiming a criminal child neglect statute is void for vagueness, a "defendant cannot rely on hypothetical situations at the periphery of the statute in asserting his vagueness challenge, but must instead demonstrate that he was unable to determine from a reading" of the statute "that his conduct was prohibited."[376] In light of the egregious facts of criminally charged child neglect cases, most defendants arguably will find this standard very difficult to meet.

b. Criminal Child Neglect Statutes Withstand *Challenge*—Lower courts have found that all categories of criminal child neglect statutes have passed constitutional muster. In rare cases when a court finds a phrase void for vagueness, the state legislature usually amends the statute. Additionally, state courts look to other state courts and use those opinions to guide their findings of constitutionality.

State courts have repeatedly upheld the child endangerment category of criminal child neglect statutes as constitutional. As

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[372]Kolender v. Lawson, 461 U.S. 352, 357 (1983).

[373]*Id.* at 358 (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)).

[374]486 U.S. 356 (1988).

[375]*Id.* at 361 (citations omitted).

[376]State v. Butterfield, 874 P.2d 1339, 1343 (Or. Ct. App. 1994) (defendant failed to obtain "necessary and proper medical care for injured child," statute held not void for vagueness).

early as 1965, laws prohibiting "willfully causing or permitting a child to be placed in such a position that its life or limb may be endangered or its health likely to be injured," have been upheld. Courts typically find that endangerment statutes seek to reach conduct that "defies precise definition" and that the various kinds of situations "where a child's life or health may be imperiled are infinite" and although the statutory language may be broad and "the prohibited behavior is very general, this seems necessary in the nature of the subject matter."[377]

In more recent cases, this type of statute was held constitutional based on a "common sense test" or "rule of reason." With a statute prohibiting "willfully unreasonably causing or permitting a child . . . to be placed in a situation in which its life, body or health may be injured or endangered," the Supreme Court of Kansas held that the statute was designed "to prevent people from placing children in situations where their lives and bodies are in imminent peril, and that the statute, given a common sense interpretation, [was] not vague."[378]

The Court of Appeals of New Mexico upheld a similar statute as not unconstitutionally vague because the statute did not apply to ordinary situations when a child is injured, but only to abuse, and "not mere normal parental action or inaction."[379]

The second category of criminal child neglect, child abandonment statutes, generally includes the oldest laws of child neglect; legislatures virtually have "perfected" crimes identifying abandonment. Child abandonment statutes are more clear and are challenged less. **As** one court stated, "Leaving children of tender years, completely dependent upon those in whose care they are entrusted, pathetically vulnerable to any danger that could foreseeably materi-

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[377]People v. Beaugez, 43 Cal Rptr. 28, 32-33 (Cal. Dist. Ct. App. 1965).

[378]State v. Fisher, 631 P.2d 239, 240 (Kan. 1981) (holding that the term "unreasonably" as applied in the statute was "the doing or the omitting of some action contrary to reason, the doing of or omitting to do something that the average person, possessing ordinary mental faculties, would not have done or would not have omitted under all the attendant and known circumstances."). *Id.* at 241-42. The court held the term "may" to mean "something more than a faint or remote possibility; . . . a reasonable probability, a likelihood that harm to the child will result." *Id.* at 242; ***see*** *also* State v. Hoehl, 568 P.2d 484 (Colo. 1977) (holding that a statute stating "knowingly, intentionally, or negligently, and without justifiable excuse, causes or permits a child to be placed in a situation that may endanger the child's life or health," was not void for vagueness; the term "may" meant reasonable probability, and "without justifiable excuse" referred to a specific statute on justification).

[379]State **v.** Coe, **587** P.2d 973, 974 **(N.M.** Ct. App. 1978) (statute defining abuse to include "a person knowingly, intentionally, or negligently, and without justifiable cause, causing or permitting a child to be placed in a situation that may endanger the child's life or health"). *Id.*

alize, is the type of conduct that would cause the most callous to find reprehensible."[380]

Courts also have upheld statutes in the criminal nonsupport or deprivation category. These statutes include criminalizing the refusal or neglect to provide support for a child; defining support to include necessary and proper food, clothing, medical attention and education.[381] Courts tend to uphold these statutes because "[p]arents have a legal obligation to provide for their minor children."[382]

Another area of "void-for-vagueness" challenges involves statutes that include the phrase "by violating a duty of care, protection or support." On review, courts have upheld these criminal child neglect statutes. For example, in interpreting a statute prohibiting a parent from creating "a substantial risk to the health or safety of such child, by violating a duty of care, protection, or support," the Supreme Court of Ohio found that the terms "substantial risk" and "duty of care, protection, or support," were not unconstitutionally vague.[383] The court held that "the norm in our society is for a parent to strive to see that his children are reasonably well nourished, housed, and clothed and reasonably protected from harm, and provided with necessary health care."[384]

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[380] Commonwealth v. Skufca, 321 A.2d 889, 893 (Pa. 1974). Abandonment statutes usually include any of the following: a required mens rea of "intent to sever parental duties;" a requirement of "leaving a child under a specific age unattended in a situation likely to endanger health and welfare;" or language addressing creating a substantial risk of physical injury. Therefore, courts typically find that abandonment statutes are not void for vagueness. *See id.* (In this Pennsylvania statute, abandonment occurred when a child under age 16 was abandoned in destitute circumstances, or when a parent willfully failed to supply necessary and proper food, clothing, or shelter for a child. Defendant left a three-year-old child and a ten-month-old child unattended with the doors jammed. The children died in a fire because a neighbor could not get them out. The court held that the statute was not void for vagueness.); *see also* State v. Rosen, 589 P.2d 1132 (Or. Ct. App. 19791 (holding that a defendant could only be charged under child neglect not criminal nonsupport. Defendant left her three-month-old daughter in a car overnight while she got drunk and did not return for the child. The child was found dead the next morning.). Additionally, the type of clauses included in abandonment statutes also appear in endangerment statutes; therefore, judicial opinions upholding endangerment also apply to the abandonment statutes.

[381] *See* State v. Butterfield, 874 P.2d 1339, 1343 (Or. Ct. App. 1994) (court upheld statute requiring "necessary and proper" care, not void for vagueness).

[382] State v. Duggar, 806 S.W. 2d 407, 408 (Mo. 1991) (holding statute prohibiting "knowing failure to provide, without good cause, adequate food, clothing, and lodging, for minor child," not unconstitutionally vague because of the term "minor").

[383] State v. Sammons, 391 N.E. 2d 713, 715 (Ohio 1979). The court considered this a "reasonable standard of duty of care and protection of one's children generally to be applied throughout the community." *Id.*

[384] *Id.* at 715. The defendant failed to stop tortuous branding of his children and failed to obtain medical treatment for the children. The court held that there was adequate notice of the standard of conduct the statute required; and found that "[a] man of 'common intelligence' would know that appellant's conduct presented a

Courts also have upheld criminal child neglect statutes based on the statute's "criminal negligence" standard. States give defendants fair notice that gross deviations "from the standard of care which a reasonable person would exercise in such a situation"[385] trigger criminal liability.[386]

One consistent theme in cases involving egregious facts is that courts have upheld the constitutionality of criminal child neglect statutes. Based on the Supreme Court's guidance in *Maynard v. Cartwright*, lower courts have found that the child neglect statutes meet the void for vagueness standard. The courts have found that the defendants were on notice that their charged conduct was criminal.[387] Courts typically find that child endangerment statutes are not vague when applied to outrageous cases, and "the possibility of vagueness in peripheral situations need not be considered."[388]

Other courts have repeatedly followed this rationale in criminal child neglect cases. In one case involving a nine-year-old child locked in an unheated room; given very little food; and forced to live in very unsanitary conditions for several years, the court experienced no difficulty finding the conduct within the criminal statutory

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strong possibility of harm to the health or safety of appellant's children." *Id.; see also* State v. Bachelder, 565 A.2d 96, 97 (Me. 1989). In ***Bachelder,*** the defendants unsuccessfully challenged a child endangerment statute that prohibited knowingly endangering a "child's health, safety or mental welfare by violating a duty of care or protection." *Id.* at 97. Charged with one count for each of her six children, for her failure to provide adequate supervision, food, clothing and shelter, the defendant allowed her three-year-old, eight-year-old and ten-year-old children to wander the streets alone; failed to feed, clothe, and bathe them; and allowed "their residence to become so dirty that it was unfit for habitation." ***Id.*** Although the statute did not define the duty, nor specify who had a duty, the court upheld the conviction, because the defendant was the natural mother, found her accountable, and the statute valid. Cases like this reflect a court's tendency to find that a defendant owes a duty, based on the relationship to the child. ***See also*** State v. Crossetti, 628 A.2d 132 (Me. 1993) (holding that an aunt owed a duty of care to her fourteen-year-old niece living with her temporarily).

[385] State v. Damofle, 750 P.2d 518, 521 (Or. Ct. App. 1988) (defendant charged with criminal mistreatment for violating a legal duty to provide care, with criminal negligence, by withholding necessary and adequate food, physical care or medical attention; court held that the statute was constitutional); ***see also*** State v. Mills, 629 P.2d 861 (Or. Ct. App. 1981).

[386] In cases where the statute requires a higher mens rea (knowingly or intentionally), courts infer the intent from the conduct itself. ***See*** State v. Crowdell, 487 N.W.2d 273 (Neb. 1992).

[387] For example, ***see*** State v. Poehnelt, 722 P.2d 304 (Ariz. Ct. App. 1985). In ***Poehnelt,*** a nine-year-old child was found hog tied, gagged, and emaciated—having been systematically starved for four to five years—severly underweight, and was experiencing stunted growth. The court easily found the statute constitutional. The court stated, the "starving of a child. . . to the point of obvious gauntness and to such an extent that the stunted growth motivated appellants to conceal the child, is not a borderline case." *Id.* at 312.

[388] *Id.*

prohibition.[389] In other cases, where the condition of the residence was unsanitary, deplorable, and hazardous, courts have unhesitatingly upheld the statute's constitutionality.390 In essence, egregious facts determine the outcome of constitutional void-for-vagueness challenges. Accordingly, criminal child neglect statutes generally will withstand scrutiny.

VI. Possible Solutions: Providing Standards

Although they withstand scrutiny, state statutes remain inconsistent from jurisdiction to jurisdiction. To adequately address the problem of child neglect in the military community, the armed forces must eliminate inconsistencies and promote fairness. The best solution is a *uniform* family advocacy program, combined with *uniform criminal* standards and available criminal sanctions. This article does not focus, however, on the family advocacy program, but rather on the lack of uniform standards and punitive options. The military could take many different approaches to correct the existing problems in its response to child neglect. To best address the problem of child neglect in the military community, any solution should provide consistent criminal standards for parental responsibilities. Because parental responsibilities do not change from service to service and location to location, the standards should not change. The armed forces, either through its own or congressional

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[389] State v. Crowdell, **487** N.W.2d. 273 (Neb. 1992). At trial, Jeff described the bathroom conditions he was forced to endure while confined in his room:

> Q. Jeff, What would you do if you had to go to the bathroom, after you were put in the room?
>
> **A.** Usually, I'd have to—Well, if I had to urinate, It'd go out my window. If I had to do otherwise, I'd usually go in my shirt or something.
>
> Q. Okay. Would you ever try to let anybody know that you had to go to the bathroom . . . [?]
>
> A. Sometimes. I'd just knock on the floor, or knock on the door to be let out. But, sometimes they [the other children] weren't supposed to let me out and stuff.
>
> Q. Would your parents let you out when you'd knock and say you had to go to the bathroom?
>
> **A.** Sometimes.

Id. at 276

[390] *See* State v. Damofle, **750** P.2d 518 (Or. Ct. App. 1988) The court found a criminal mistreatment statute constitutionally sufficient where defendants lived with their three children (five-months, one-and-a-half-years, and five-years old) "in a room constructed of plastic and wood inside a barn under unsanitary conditions." *Id.* Among other things, it was cold, wet, musty, and smelled; they used a coffee can as the toilet and it was full of urine; crackers and formula were next to the urine; bags of garbage, clothing, dirty diapers, bags of dirty dishes, soured bottles of baby formula, and flies were everywhere. ***See also*** State v. Deskins, 731 P.2d **104** (Ariz. Ct. App.. 1987).

action, could produce consistent standards throughout the services. The possible actions include: amending the UCMJ;[391] enacting a federal law criminalizing child neglect;[392] and implementing executive branch initiatives, such as an executive order adding a UCMJ, Article **134** offense, or DOD or individual service punitive general order, directive, or regulation.[393]

Each proposal criminalizes child neglect by providing criminal sanctions for the three prevailing categories used throughout the states for criminal child neglect: child abandonment, child endangerment, and deprivation of necessities. Based on the status of potential offenders (military or civilian), the provisions differ slightly. Modeled after seven different state criminal child neglect statutes, the recommended statutory provisions focus on parental duties codified in state criminal child neglect statutes.[394]

The objective is to correct the conduct of both military members and civilian spouses. Although each potential corrective action would not provide complete uniformity and criminal jurisdiction over all offenders present in the military community, each would regulate parental responsibilities — an area plagued with inconsistencies and ambiguities. *To* best understand each proposal and what inadequacies the proposal would rectify, the following discussion will review each proposal in terms of "who, what, and where"— *To whom will the law or general order apply? What offenses will it make criminal? Where will it work?*

A. A Proposed Amendment to Chapter 47 of Title 10 United States Code: A Proposed Punitive UCMJ Article

1. What a New Punitive Article Will Accomplish — The proposed amendment to the UCMJ (Appendix B) and proposed execu-

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[391] *See infra* Appendix B and C (providing the proposed amendment and implementing executive order).

[392] *See infra* Appendix D (providing the proposed amendment to 18 U.S.C.).

[393] *See infra* Appendix E for the proposed DOD general order. Similarly, the DOD also could include punitive provisions in a joint regulation. These provisions would reflect the prohibitions in the proposed general order at Appendix E. See *infra* Appendix F for proposed punitive provisions to be added to *AR 608-18.* The applicability, penalties, and enforcement paragraphs were taken in large measure from the corresponding paragraphs in *AR 608-99* (applicability, at i; penalties, paragraph 1-6; and enforcement, paragraph 3-10).

[394] The abandonment offense is modeled after the Illinois Annotated Statutes, see **720** ILL. ANN. STAT. ch § 5/12-21.5 (Smith- Hurd 1994). The endangerment offense is modeled after the Virginia Code and the California Penal Code, see VA. CODE ANN. § 40.1-103 (Michie 1994); CAL. PENAL CODE § 273a (1993). The criminal deprivation offense is modeled after the Alaska Statutes, the California Penal Code, the Florida Statutes Annotated, and the Minnesota Statutes Annotated, see ALASKA STAT. § 11.51.120 (1994); CAL. PENAL CODE § 270 (West 1995); FLA. STAT. ANN § 827.05 (West 1995); MINN. STAT. A". § 609.378 (West 1995).

tive order (Appendix C) provide an entirely new punitive article. As the proposed amendment and implementing executive order reflect, the proposed offense is called "child neglect" and prohibits three types of misconduct: child abandonment, child endangerment, and criminal deprivation of a child (necessities and substandard environment). As an additional punitive article, the proposed charge would not require the government to prove an additional element of service-discrediting conduct or conduct prejudicial to good order and discipline.

A new punitive article for child neglect would resolve two issues. First, it would establish clear guidelines for minimal parental obligations for all service members. Secondly, it would provide criminal jurisdiction over service members assigned both in the United States and abroad for child neglect.

Service members already are held criminally liable under the UCMJ for similar negligent or reckless acts or omissions (i.e., when dealing with property, etc.). This new article would merely expand criminal liability to harmful and egregious parental commissions and omissions. A punitive article would notify service members that this conduct is criminal. Moreover, service members would be criminally responsible for their willful, negligent, and reckless conduct toward their children. Several punitive UCMJ articles already punish service members for neglect,[395] or acting negligently[396] or recklessly.[397] Comprehensive definitions for those terms already appear

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[395] UCMJ art. 87 (1984). In missing movement through neglect, neglect is defined as "the omission to take such measures as are appropriate under circumstances to assure presence." *Id.*

[396] *Id.* art. 92. In dereliction of duty through neglect, the term "negligently" is defined as "an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances." *Id.; see also id.* art. 110. In improper hazarding of a vessel, negligence is defined as

> the failure to exercise the care, prudence, or attention to duties, which the interests of the government require a prudent and reasonable person to exercise under the circumstances. This negligence may consist of the omission to do something the prudent and reasonable person would have done, or the doing of something which such a person would not have done under the circumstances.

Id.

[397] *Id.* art. 111. In reckless driving, recklessness occurs when the driver of the vehicle "exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. . . . [W]hether, under all the circumstances, the accused's manner . . . was of that heedless nature which made it actually or imminently dangerous." *Id.*

throughout the UCMJ and *Department of the Army Pamphlet* **27-9,** ***Military*** *Judges' Benchbook*.[398]

The new offense would prohibit abandonment, endangerment, and deprivation. The common types of parental omissions would fall within the scope of the new article. The new offense would provide uniform criminal standards for supervision of minors. The proposed offense of abandonment would prohibit failures to supervise and deprivation of necessities, areas commonly regulated by numerous, inconsistent installation regulations.[399] Service members who fail to obtain medical treatment for their children after the child suffered injuries from abuse would face criminal liability (endangerment). Furthermore, service members who place their children with a caretaker known to abuse children would be criminally liable under the child neglect article (endangerment).

More expansive than the proposed amendment to Title 18, United States Code, is the proposed UCMJ article, which includes an additional type of offense in the criminal deprivation category. Because a number of military cases involve service members who willfully allowed their children to live in substandard living conditions,[400] an offense for an unhealthy, substandard environment is included. The offense only applies in cases where the child's health is significantly impaired as a result or is in danger of being significantly impaired. To maintain our "honorable military service," and "its necessarily high standards of conduct"[401] this offense is more expansive than the proposed Title 18 amendment.

As part of the UCMJ, a new punitive article would provide criminal sanctions and uniform standards for all military offenders both inside and outside the United States. Wherever the crime occurs, this punitive article would allow military investigators to investigate allegations of the crime of neglect for all allegations on post and cases involving service members off post. Without a military offense, military investigators frequently will not investigate.

The proposed article includes enhanced punishment for specif-

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[398] DEP'T OF ARMY, PAMPHLET 27-9, MILITARY **JUDGES'** BENCHBOOK (1 May 1982) [hereinafter BENCHBOOK]. The definitions in the proposed executive order (Appendix C) and DOD general order (Appendix E) for terms "willfully," "negligence," "reckless," and "suffer" appear in different parts of the *Militaly* ***Judge's*** *Benchbook (Benchbook).* The definitions in Appendix C reflect the following paragraphs in the *Benchbook:* paragraph 3-70 (willfully and negligence); paragraph 3-75 note 13 (reckless, updated 28 February 1994). The same or similar definition for these terms appears throughout the UCMJ. The definition for "knowledge" that appears in Appendix C reflects the definition used in UCMJ article 91.

[399] *See supra* notes 191-97 and accompanying text; ***see*** *also infra* Appendix **A.**

[400] *See supra* notes 191-97 and accompanying text; *see also infra* Appendix A.

[401] EDWARDS, *supra* note 306, at 22.

ic offenses. Similar to UCMJ, Article 128 (Assault), this proposed punitive article provides increased punishments based on the proof of *actual* harm. However, some conduct causing *potential* harm also may fall within the scope of this proposed offense.

2. What a New Punitive Article Will Not Accomplish — This legislative proposal will only extend criminal jurisdiction to service members and will not give the military criminal jurisdiction over civilians for child neglect. The military's only approach to civilians would be voluntary participation in family advocacy programs and limited administrative actions.

B. A *Proposed Amendment to Title 18 of the United States Code: The Child Neglect Act of 1996*

The proposed amendment to Title 18 (Appendix D), like the proposed UCMJ offense, provides criminal sanctions for child abandonment, child endangerment, and criminal deprivation (of necessities only).

1. What an Amendment to Title 18 United States Code will Accomplish — This proposed amendment would provide criminal jurisdiction, over both military and civilian offenders, for child neglect occurring in the "special maritime and territorial jurisdiction" of the United States — that is, federal concurrent or exclusive jurisdiction. This is the only method to gain criminal jurisdiction over civilians. However, based on the current definition of "special maritime and territorial jurisdiction," criminal jurisdiction would not extend to offenses that civilians commit abroad. Therefore, an amendment would not provide jurisdiction over civilian offenders in foreign countries.

As the United States Supreme Court has stated, to extend criminal jurisdiction of crimes against individuals to outside the United States, Congress must expressly state that intent within the amendment to Title 18.[402] In the alternative, Congress could pass legislation providing jurisdiction over civilians accompanying the forces or expand federal court jurisdiction.[403]

In any case, an amendment to Title 18 that provides a federal offense for child neglect will "pull" civilians into federal jurisdiction for on-post offenses. As a result, as part of prosecution, the military could require civilians to participate in the family advocacy program.

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[402] *See* United States v. Bowman, *260* U.S. 94, 98 (1922).

[403] Because this is not an offense against the United States, the proposed amendment does not include congressional intent to apply overseas.

Some members of Congress agree that a need exists for a federal criminal child endangerment and abuse statute. In 1993, congressional representatives introduced the Child Endangerment and Abuse Act; a bill "to amend Title 18 United States Code to provide penalties for child endangerment and abuse in the special maritime and territorial jurisdiction of the United States."[404] The proposed legislation created a federal offense for "inflict[ing] any physical injury upon a minor" or "permit[ting] another to inflict any physical injury upon that minor."[405] In defining physical abuse, the 1993 proposed bill encompassed deprivation of necessities resulting in malnutrition or a failure to thrive.[406] Although the bill did not adequately address other types of child neglect, the introduction of the bill itself indicates some political support for federal legislation in the area. However, because the statute did not survive a congressional committee's scrutiny in 1993, it is unlikely to gain enough support for congressional enactment.

Overall, a federal child neglect act would fill the void in federal legislation.[407] Federal prosecutors no longer would be forced to use applicable federal general criminal provisions, (such as assault or homicide) or assimilate state statutes under the Federal Assimilative Crimes Act. Furthermore, federal courts would gain legislative guidance and a unified federal policy.[408]

2. What an Amendment to Title 18 United States Code Will Not Accomplish — As stated, without further expansion of jurisdiction over civilians accompanying the forces, an amendment to Title 18 will not provide jurisdiction over civilian offenses abroad. Furthermore, taking jurisdiction would entail various logistical problems in prosecuting dependents for overseas offenses.[409] Based on the decrease in the armed forces assigned overseas and the number of dependents[410] such criminal jurisdiction will become less of a priority.

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[404] H.R. 3366, 103d Cong., 1st Sess. § 2259 (1993).

[405] *Id.* This bill further defined physical injury to include "failure to thrive or malnutrition;" and "any other condition which imperils the child's health or welfare . . ." Id. This bill also defined "serious physical injury" to include "any conduct toward a child which results in severe emotional harm, severe developmental delay or retardation, or severe impairment of the child's ability to function. . . ." Id.

[406] *Id.*

[407] Some professionals call for a federal child abuse act. See Austin, ***supra*** note 80, at 210 (describing the federal legislative void as a "major hole").

[408] *Id.* at 227.

[409] *See* McClelland, ***supra*** note 118, at 201 and sources cited therein.

[410] DEP'T OF ARMY, PROGRAM ANALYSIS AND EVALUATION DIRECTORATE, AMERICA'S ARMY: PROJECTING DECISIVE POWER 7 (1994). In 1989, 213,000 military personnel were assigned overseas, by 1996, 65,000 military forces are projected to remain overseas. Id.

C. Proposed Executive Branch Initiatives

By issuing an executive order, the President could add a new Article **134** offense for criminal child neglect. Although the COMA has found that some cases are not service discrediting, the government could overcome this obstacle with additional proof.[411] Presidential action would not require congressional approval and would be an expedient method to provide criminal sanctions for military offenders.

The **DOD** also could take action without any congressional action. Possible **DOD** actions include a **DOD** punitive general order, directive, or regulation (or punitive regulatory provisions) for child neglect. Any **DOD** action should reflect the provisions in the proposed **DOD** general order at Appendix E of this article. A **DOD** initiative should include language making the provisions punitive and should describe the three types of child neglect (including criminal deprivation of a child due to harmful environment). Similarly, the individual services could issue punitive regulations or provisions (see Appendix F of this article).

1. What Executive Branch Initiatives *will* Accomplish—Like the proposed UCMJ amendment, any executive branch initiative will only provide punitive sanctions for service members. The executive order would amend the UCMJ in a manner similar to the proposed Title 10 amendment, and would apply at all assignments, decreasing the chance of disparate treatment. The identification of consistent standards is likely to reduce confusion throughout the military community. All installations will have the same standards for parental responsibilities, and consistent, available punitive sanctions.

The **DOD** action would provide the same advantages. As the focal point for military standards, the **DOD** could quickly disseminate clear standards of parental responsibility throughout the military. Moreover, the **DOD** could take this action without any required legislative support. This also would reduce the amount of "void-for-vagueness" objections to local punitive regulations and fulfill the constitutional prerequisite of notice prior to prosecution. This option would allow the armed forces flexibility to change the standards as societal standards change.

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[411] Some judge advocates believe that there is *potential* to successfully argue a clause **1** or **2,** Article **134** offense if the government shows proof of a legally enforceable parental duty under state law, or a clear custom of the service, despite the Army Court of Military Review's decision in United States **v.** Wallace, **33** M.J. 561, **564** (A.C.M.R. 1991). However, to adequately address the void in the law, the proposed UCMJ article or proposed DOD action are the more realistic options and would provide uniform criminal standards. Telephone interview with Colonel John M. Smith, Chief, Government Appellate Division, United States Army Legal Services Agency (Mar. 29, 1995).

2. What Executive Branch Initiatives will Not Accomplish— The DOD action will not provide criminal sanctions for civilian offenders. Although DOD actions can control DOD employees, parenting is beyond the scope of their employment. Therefore, because parenting is not job related, punitive sanctions against DOD civilians would raise extensive labor issues. The major difference between an executive order and DOD action is that violation of DOD punitive standards would be a violation of UCMJ, Article **92.** *As* a result, the offense would not carry any enhanced punishment for injury to the child (although under UCMJ Article **56,** the President could so provide).

VII. Recommended Solution and Why

Ideally, the best solution is legislative action. Realistically, however, to provide uniform criminal standards throughout DOD, an executive initiative is the logical approach. Amendments to both Title 10 and Title 18 would provide criminal jurisdiction over all offenders in the military community. Although a Title 18 amendment provides criminal liability for both military and civilian offenders, a Title 10 amendment would fill the gap providing criminal sanctions for military offenders outside the United States. Therefore, enactment of both amendments would provide the most expansive jurisdiction. Even with the enactment of the proposed amendments to Title 10 and 18, problems with the military's treatment of child neglect would remain. The military still would not have jurisdiction over civilian offenders who violate the law off post or abroad. Additionally, enforcement still would be difficult because the government would charge civilian offenders in the federal court system, an already overburdened system. In any case, due to the lack of political interest, legislative actions are unlikely.

Accordingly, the recommended (and realistic) response to this problem is action through either presidential initiatives, DOD action, or individual service initiatives. To obtain presidential action, the DOD must rely on other organizations. Therefore, to expeditiously address inadequacies, a punitive DOD order, directive, or regulatory provisions is the most realistic.

The DOD could publish a joint service regulation implementing the family advocacy programs and containing punitive provisions that reflect those appearing in the proposed DOD action (see Appendix E of this article). Easy to amend, a joint regulation would allow flexibility. This DOD action could resolve the inconsistencies in the individual family advocacy programs, such as their inconsis-

tent implementing regulations and lack of centralization. Additionally, DOD action could limit the confusion between any criminal standard for child neglect and the administrative, family advocacy standard of child neglect. Although not extending jurisdiction to civilian offenders, punitive DOD standards could provide flexibility for the military and notice to the entire community. The standards for parental responsibility would not change from installation to installation. Without any congressional action, the DOD could issue a joint regulation that provides standards and available sanctions.

Alternatively, the Army should take the lead and provide punitive provisions in Army regulations. Simply adding a punitive provision in the Army implementing regulation for the family advocacy program, *AR 608-18*,[412] would provide service-wide standards. Similar to ***AR** 608-99, Family Support, Child Custody, and Paternity*,[413] where the Army has provided punitive sanctions for failure to pay child support, the Army could take the lead with a punitive child neglect provision. At the very least, to expeditiously resolve the most common inconsistencies, the Army should promulgate a punitive regulatory provision; thus providing consistent standards (see Appendix F of this article). With the addition of such provisions, soldiers throughout the Army would find consistent military requirements for parental responsibilities without regard to duty assignment.

VIII. Implementation: What Any Action Could Accomplish

Any action would achieve the objective of providing criminal sanctions. All would increase options and place commanders and prosecutors in better positions, while enhancing the efforts of the family advocacy programs in preventing child neglect and maintaining service member readiness.

Any action would fulfill the need for uniformity and notice for the uniformed services. Commanders and trial counsel need consis-

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[412] AR *608-18, supra* note **41.**

[413] AR *608-99, supra* note 311. As early as November **4,** *1985,* the Army has had a punitive regulation requiring soldiers to provide financial support to family members in specific situations and prohibiting soldiers from violating court orders on child paternity and custody. Alfred **F.** Arquilla, *Changes in Army Policy on Financial Nonsupport and Parental Kidnapping,* ARMY LAW., June *1987,* at 18; Alfred F. Arquilla, *Family Support, Child Custody, and Paternity,* 112 MIL. L. REV. *18* (1986); Telephone interview with Colonel Alfred F. Arquilla, Chief of the Legal Assistance Division, Office of The Judge Advocate General (Mar. **27,** *1995);* Interview with Major Gregory **O.** Block, Professor, Administrative and Civil Law Division, The Judge Advocate General's School, United States Army, Charlottesville, Virginia (Mar. 9, 1995).

tency and a full realm of options when a service member commits criminal child neglect. Commanders, trial counsel, service members, and children will benefit from any action providing uniform standards. Commanders will gain the opportunity to choose punitive sanctions when a first-time offender commits an egregious offense. Trial counsel will not have to grapple with the charges for nonjudicial punishment or courts-martial. Service members will be on notice, no matter where they are assigned. With so many service members in so many locations, with the numerous applicable laws, the military should give service members consistent standards and constant notice of their parental duties.

All of the proposed alternatives have one drawback; neither legislative nor executive branch initiatives will remove service members from state jurisdiction. Therefore, the potential inconsistency and state criminal liability still exist. Furthermore, the proposed options will not terminate parental rights or remove the child from the home. Potential initiatives will, however, provide a basis for such action.

IX. Conclusion

The military has responded to the problem of child neglect in an ad hoc manner. The military's response is filled with inconsistent state criminal statutes, jurisdictional inconsistencies, and differing punitive installation regulations. While the military has family advocacy programs-essentially child protection agencies—the military is foregoing other options that are available in the civilian sector-criminal sanctions. Like the civilian sector, the military needs both civil child protection programs and criminal standards. Additional punitive options, and uniform criminal standards for child neglect will enhance family advocacy programs.

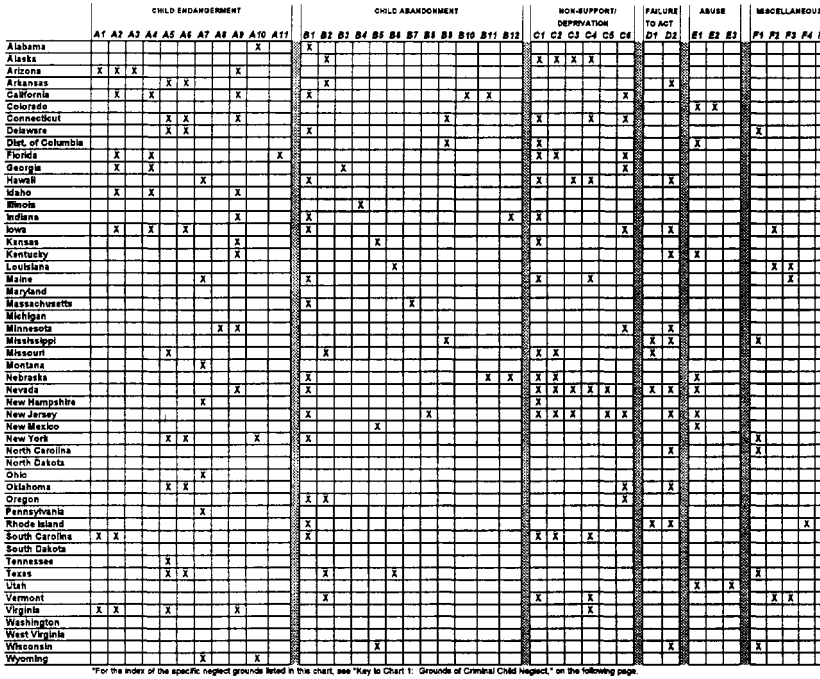
Failure to fulfill parental responsibilities, as well as inconsistent standards of responsibilities, adversely affect unit readiness and discipline, and military community morale and welfare. Therefore, the military's overall goal should be to provide uniform standards, while providing punitive options. As a minimum, the military should provide standards for specific types of child neglect that warrant punitive sanctions; thereby providing standards for parental obligations.

A uniform criminal standard for child neglect would provide notice for the military community, law and order for a disciplined military society, options for commanders and trial counsel, and readiness for our armed forces. The military's organizational goals

highlight the need for such a standard. The military has a *duty* to notify the community of the standard; service members and their families deserve notice of the standards; and commanders need options. Whether or not military parents agree on the standard, out of fairness all military parents deserve notice of the standards. Such a standard would also support the military's policy to promote the welfare of the military family, by publishing, and possibly raising, the standard of care for children.

The *idealistic* answer to obtaining uniform criminal standards is legislative action. Although unlikely, legislative initiatives would provide the most expansive answer to the problem of child neglect. The *realistic* response is DOD action that expeditiously promulgates a punitive regulatory provision for child neglect and provides uniform standards for parental responsibilities DOD wide. In any case, if nothing else, the Army should provide its soldiers with uniform standards. When dealing with the problem of child neglect, perhaps any action is better than no action.

Chart 1
Criminal Child Neglect Statutes in the 50 States



	CHILD ENDANGERMENT											CHILD ABANDONMENT												NON-SUPPORT/ DEPRIVATION						FAILURE TO ACT		ABUSE			MISCELLANEOUS					
	A1	A2	A3	A4	A5	A6	A7	A8	A9	A10	A11	B1	B2	B3	B4	B5	B6	B7	B8	B9	B10	B11	B12	C1	C2	C3	C4	C5	C6	D1	D2	E1	E2	E3	F1	F2	F3	F4	F5
Alabama										X		X																											
Alaska													X											X	X	X	X												
Arizona	X	X	X						X																														
Arkansas					X	X							X																		X								
California		X		X					X			X									X	X						X											
Colorado																																X	X					
Connecticut					X	X			X											X				X			X		X									
Delaware					X	X						X																							X				
Dist. of Columbia																				X				X								X						
Florida		X		X							X													X	X				X									
Georgia		X		X										X															X									
Hawaii							X					X												X		X	X			X								
Idaho		X		X					X																													
Illinois															X																							
Indiana									X			X										X		X														
Iowa		X		X		X						X																X		X					X			
Kansas									X							X								X					X									
Kentucky									X																				X		X							
Louisiana																	X																		X	X		
Maine							X					X												X			X									X		
Maryland																																						
Massachusetts												X						X																				
Michigan																																						
Minnesota								X	X																			X		X								
Mississippi																				X										X	X				X			
Missouri					X								X											X	X					X								
Montana							X																															
Nebraska												X										X	X	X	X						X							
Nevada									X			X												X	X	X	X	X		X	X	X						
New Hampshire							X																	X														
New Jersey												X						X						X	X	X		X	X		X	X						
New Mexico																X																X						
New York					X	X				X		X																							X			
North Carolina																															X				X			
North Dakota																																						
Ohio							X																															
Oklahoma					X	X																						X		X							
Oregon												X	X															X										
Pennsylvania							X																															
Rhode Island												X																		X	X						X	X
South Carolina	X	X										X												X	X		X											
South Dakota																																						
Tennessee					X																																
Texas					X	X							X				X																		X			
Utah																																X		X				
Vermont													X											X			X								X	X		
Virginia	X	X			X				X																		X										
Washington																																						
West Virginia																																						
Wisconsin																X														X					X			
Wyoming							X				X																											

*For the index of the specific neglect grounds listed in this chart, see "Key to Chart 1: Grounds of Criminal Child Neglect," on the following page.

KEY TO CHART 1—GROUNDS OF CRIMINAL CHILD NEGLECT

A—CHILD ENDANGERMENT

1. Knowingly causelpermit life/limb endangerment.
2. Knowingly causelpermit healthiphysical injury/ endangerment.
3. Knowingly causeipermit moral welfare imperilment.
4. Knowingly causeipermit harm to emotional/mental health.
5. Knowingly engage in conductiact creating risk of harm to healthiphysical welfare; likely to physically injure.
6. Knowingly engage in conduct/act creating risk of serious harm to mental welfare; likely to mentally or morally injure.
7. Knowingly endanger welfare by violating a duty of care/ protection/support.
8. Causeipermit child's presence where sellingipossessing a controlled substance.
9. Cause placement in situation likely to harm health or cause death.
10. Directiauthorize child to engage in occupation involving risk of danger to lifehealth.
11. Permit living in deprivationienvironment that causes physical/emotional health impairmentiin danger.

B—CHILD ABANDONMENT

1. Abandon/desert purposefully/with intent to abandon.
2. Desert with intent to abandon—creating substantial risk of physical injury; likely to endanger health.

3. Physically abandon with intent to sever parentalicustodial duties/responsibilities.
4. Knowingly leave without supervision without regard for mentaliphysical health, safety/welfare.
5. Leave in place where child may suffer due to neglect, with intent to abandon.
6. Leave unattended to child's own care (includes in vehicles).
7. Abscond/fail to perform contract for board/maintenance
8. Fail to care for and keep control and custody so public/charity supportimaintenance required.
9. Exposure (or aidiabet) to highway, street, field house, outhouse elsewhere with intent to abandon.
10. Falsely represent child to orphanage.
11. Failirefuse to maintain child.
12. Cruelly confine.

C—CRIMINAL NONSUPPORT /DEPRNATION

1. Fail to provide necessary food, clothing, shelter, lodging, protection from the weather.
2. Fail to provide medical attention.
3. Fail to provide education.
4. Fail to provide care (necessary, parental, physical or other remedial care).
5. Fail to provide supervision.
6. Willfully omit/deprive of necessary sustenance (food, shelter, clothing, medical attention).

D—FAILURE TO TAKE ACTION TO PREVENTABUSE

1. Permiticondone child engaging in prohibited sex/sexual

batteryisexual exploitation/sexual simulation for film; permit use for wantonlimproper purpose.

2. Permit abuse (abuse includes sexual abuse, any physical injury); condoneiallows another to injure.

E—CHILD ABUSE COMBINED STATUTE

1. Abuseimaltreatment includes to cause injury to lifehealth, or permit placement in situation that poses a threat of injury.
2. Abuse includes to engage in pattern of conduct resulting in malnourishment, lack of proper medical care, cruel punishment, or mistreatment.
3. Inflict/cause (by conduct) physical injury (physical injury includes failure to thrive, malnutrition, or emotional harm).

F— MISCELLANEOUS

1. Cause or intentionally do or fail to do any act resulting in child becoming a neglected child or injury to child.
2. Exposure to hazard/danger (such that child cannot reasonably expect to protect itself or lifehealth endangered).
3. Cruelly treat by neglect, overwork.
4. Causeipermit home to be resort of lewd drunken, wanton dissolute persons.
5. By neglectldepravity render home an unfit place for a child.

APPENDIX A

ARMY STAFF JUDGE ADVOCATE QUESTIONNAIRE: SUMMARY OF RESPONSES

(Note: This appendix represents a compilation of responses to some of the questions that appeared on the survey. Some questions required a commentary and are impossible to summarize. Additionally, this survey included two parts. This appendix summarizes only the responses from army judge advocates on the Family Advocacy Management Team).

T = Total number of responsive answers to that question.

N = Number of responses that provided the answer indicated.

Questionnaires mailed = 130; Responses = 53	41%
Response returned with blank survey (inapplicable) = 3	2%
Responses without any cases of child neglect = 2	2%

OFFICE OF THE STAFF JUDGE ADVOCATE FAMILY ADVOCACY MANAGEMENT TEAM (FACMT) REPRESENTATIVE

1. How many cases of child neglect involving either soldiers or dependent spouses, on post or off post, were reported in the last three years? (T=45)

a. 0	N=2	4%	d. 11-15	N=4	9%
b. 1-5	N=6	13%	e. 16-20	N=8	18%
c. 6-10	N=1	2%	f. 21-100	N=16	36%
			g. over 100	N=8	18%

2. Where did the offense allegedly occur?

N = number of responses reflecting the % of cases occurring at locations indicated.

On post	0-25%	N=5	
	26-50%	N=8	AVERAGE= 67% ON POST
	51-75%	N=11	
	76-100%	N=15	
Off post	0-25%	N=19	
	26-50%	N=11	AVERAGE= 32% OFF POST
	51-75%	N=5	
	76-100%	N=4	

3. Who conducted the investigation?

N = number of responses reflecting the authority indicated investigated that % of the cases.

a. FACMT	0-25%	N=12	
	26-50%	N=1	AVERAGE= 43% FACMT
	51-75%	N=2	INVESTIGATED
	76-100%	N=8	
b. *MPs/CID	0-25%	N=13	
	26-50%	N=4	AVERAGE= 34% MPs/CID
	51-75%	N=1	INVESTIGATED
	76-100%	N=5	
c. State/Local	0-25%	N=15	
Authorities	26-50%	N=1	AVERAGE= 24%
(Other)	51-75%	N=1	OTHER INVESTIGATED
	76-100%	N=4	

*Military Police/Criminal Investigation Division

4. What percentage of soldiers was subsequently enrolled in the FACMT program? (T=40)

a. 0-15%	N=5	13%	d. 46-60%	N=6	5%
b. 16-30%	N=5	13%	e. 61-75%	N=2	5%
c. 31-45%	N=3	8%	f. 76-90%	N=2	5%
			g. 91-100%	N=17	43%

5. What percentage of spouses was subsequently enrolled in the FACMT program? (T=36)

a. 0-15%	N=5	14%	d. 46-60%	N=6	17%
b. 16-30%	N=5	14%	e. 61-75%	N=3	8%
c. 31-45%	N=3	8%	f. 76-90%	N=5	14%
			g. 90-100%	N=9	25%

6. Do you have a post policy or regulation that identifies minimal standards for parental responsibility? (T=45)

a. Yes	N=31	69%	b. No	N=14	31%

7. Is it punitive? (T=31)

a. Yes	N=2	6%	b. No	N=29	94%

8. Have you had any children removed from a soldier's home (on or off post) due to child neglect? (T=39)

a. Yes	N=21	54%	b. No	N=17	46%

9. If yes, who supervised the removal? (T=22)

a. State/Local Authorities	N=9	41%	b. DOD Agency	N=13	59%

10. Does your installation have an agreement with state and local authorities involving your installation's reporting, investigating, and disposing of child abuse and neglect offenses? (data from respondents abroad not applicable) (T=27)

a. Yes N=19 70% b. No N=8 30%

11. If yes, has your installation experienced any problems with state and local authorities involving your installation's Memorandum of Agreement/Understanding for reporting, investigating, and disposing of child abuse and neglect offenses? (T=15)

a. Yes N=4 27% b. No N=11 73%

12. Post policies or regulations (either provided with survey responses or summarized in survey responses) regulate the following areas of parental responsibility: (T=21)

Supervision of Children (abandonment-type issues) N=20 95%
(including in motor vehicles)

Safety of Children (endangerment-type issues) N=12 57%

Duty to Provide Necessities (deprivation issues) N=1 5%

**NOTE: Some installation policies or regulations include two of the above areas; therefore they are counted twice, and the total percentage exceeds 100.

***NOTE: Due to rounding, compiled percentages indicated in all questions are approximate.

****NOTE: In questions two and three, raw percentage numbers from each survey respondent were used to calculate average percentages.

APPENDIX B

A BILL

To amend Chapter 47 of Title 10, United States Code (the Uniform Code of Military Justice), to provide penalties for child neglect.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE

This Act may be cited as the "Military Child Neglect Act of 1996"

SECTION 2. CHILD NEGLECT

(a) *In* General — Chapter 47 of Title 10 of the United States Code is amending by adding the following new paragraph:

3 XXX. Art. **XX. Child Neglect**

(a) Any person subject to this chapter who, as a parent, guardian, in loco parentis or having a duty imposed by marriage, court order or recognized state directive, or otherwise having physical custody or control of a child —

(1) willfully, negligently or recklessly disregarding that child's mental or physical health, safety or welfare, knowingly leaves that child who is under the age of 9 without supervision by a person over the age of 12 years; or

(2)(a) willfully, negligently, or recklessly suffers the life, person or health of that child, a person who has not yet attained the age of sixteen years, to be injured; or

(b) willfully, negligently, or recklessly suffers that child, a person who has not yet attained the age of sixteen years, to be placed in a situation where its life, person or health is endangered or likely to be endangered; or

(3) willfully or negligently deprives or allows to be deprived that child, a person who has not yet attained the age of sixteen years, of necessary food, clothing, shelter, medical attention, education, and the deprivation harms or is likely to substantially harm the child's physical, mental or emotional health; or

(4) willfully permits that child, a person who has not yet attained the age of sixteen years of age, to live in an environment, when such environment causes the child's physical, mental or emotional health to be significantly impaired or to be in danger of being significantly impaired

is guilty of child neglect.

(b) Any person found guilty of child neglect shall be punished as a court-martial may direct.

SECTION 3. EFFECTIVE DATE

This Act shall take effect on _____ 1996. Nothing contained in this Act shall be construed to make punishable any act done or omitted prior to _____ 1996, which was not punishable when done or omitted.

APPENDIX C

EXECUTIVE ORDER XXXXX

AMENDMENTS TO THE MANUAL FOR

COURTS-MARTIAL, UNITED STATES, 1984

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. §§ 801-946), in order to prescribe amendments to the Manual for Courts-Martial, United States 1984, prescribed by Executive Order No. 12473, as amended by Executive Order No. 12484, Executive Order No. 12550, Executive Order No. 12586, Executive Order No. 12708, and Executive Order No. 12767, it is hereby ordered as follows:

Section 1. Part IV of the Manual for Courts-Martial, United States, 1984, is amended as follows:

a. The following new paragraph is inserted after paragraph XX:

XX. Article XXX (Child Neglect)

a. Text.

(a) Any person subject to this chapter who, as a parent, guardian, in loco parentis or having a duty imposed by marriage, court order or recognized state directive, or otherwise having physical custody or control of a child—

(1) willfully, negligently, or recklessly disregarding that child's mental or physical health, safety or welfare, knowingly leaves that child who is under the age of 9 without supervision by a person over the age of 12 years; or

(2)(a) willfully, negligently, or recklessly suffers the life, person or health of that child, a person who has not yet attained the age of sixteen years, to be injured; or

(b) willfully, negligently, or recklessly suffers that child, a per-

son who has not yet attained the age of sixteen years, to be placed in a situation where its life, person or health is endangered or likely to be endangered; or

(3) willfully or negligently deprives or allows to be deprived that child, a person who has not yet attained the age of sixteen years, of the necessary food, clothing, shelter, medical attention, education, and the deprivation harms or is likely to substantially harm the child's physical, mental or emotional health; or

(4) willfully suffers that child, a person who has not yet attained the age of sixteen years of age, to live in an environment, when such environment causes the child's physical, mental or emotional health to be significantly impaired or to be in danger of being significantly impaired

is guilty of child neglect and shall be punished as a court-martial may direct.

b. Elements.

(1) Child Abandonment.

(a) That the accused was a parent, guardian, in loco parentis or having a duty imposed by marriage, court order or recognized state directive, or otherwise had physical custody or control of a certain person;

(b) That the accused willfully, negligently, or recklessly disregarded that person's mental or physical health, safety or welfare;

(c) That the person was then a child under the age of 9 years;

(d) That the accused knew that person was then a child under the age of 9 years; and

(e) That the accused knew he/she was leaving that person without supervision by a person over the age of **12** years.

(Note: When the period of abandonment is **24** hours or more, add the following element):

(f) That person was without supervision by a person over the age of **12** years for a **24** hours or more.

(2) ***Child Endangerment.***

(a) That the accused was a parent, guardian, in loco parentis or having a duty imposed by marriage, court order or recognized state directive or otherwise had physical custody or control of a certain person;

(b) That the accused willfully, negligently, or recklessly suffered the life, person, or health of that person to be injured; or That the accused willfully, negligently, or recklessly suffered that person to be placed in a situation where its life, person or health is endangered or likely to be endangered; and

(c) That the person was then a child under the age of 16 years.

(3) Criminal Deprivation of a Child (Necessities).

(a) That the accused was a parent, guardian, in loco parentis, or having a duty imposed by marriage, court order or recognized state directive, otherwise had physical custody or control of a certain person;

(b) That the accused willfully or negligently deprived, or allowed to be deprived, that person, of necessary food, clothing, shelter, medical attention, education;

(c) That the deprivation caused the person's physical, mental, or emotional health to be harmed or substantially likely to be harmed; and

(d) That the person was then a child under the age of 16 years.

(4) Criminal Deprivation of a Child (Environment).

(a) That the accused was a parent, guardian, in loco parentis, or having a duty imposed by marriage, court order or recognized state directive, otherwise had physical custody or control of a certain person;

(b) That the accused willfully permitted that person to live in a certain environment;

(c) That the certain environment caused that person's physical, mental or emotional health to be significantly impaired or to be in danger of significant impairment; and

(d) That the person was then a child under the age of 16 years.

(Note: When any child neglect offense results in substantial harm to the child's physical, mental or emotional health add the following element):

That the person's physical, mental or emotional health thereby suffered substantial harm.

(Note: When any child neglect offense results in serious bodily injury to the child add the following element):

That the person thereby suffered serious bodily injury.

c. Explanation.

(1) ***Willfully.*** As used in this article, "willfully" means intentionally or on purpose.

(2) ***Negligently.*** Negligence is the absence of due care. As used in this article, "negligently" means an act or failure to act by a person who is under a duty to use due care which demonstrates a lack of care for the child which a reasonably prudent person would have used under the same or similar circumstances.

(3) ***Recklessly.*** As used in this article, "recklessly" means a degree of carelessness greater than simple negligence. Recklessness is a negligent act or failure to act combined with a gross, deliberate, or wanton disregard for the foreseeable results to the person, life, or health of the child.

(4) ***Suffers.*** As used in this article, "suffer" means to allow or permit.

(5) ***Substantial harm to the child's physical, mental or emotional health.*** As used in this article includes, but is not limited to starvation, failure to thrive, or malnutrition.

(6) Child Abandonment.

(a) In determining whether the conduct was done with willful, negligent, or reckless disregard for the mental or physical health, safety or welfare of that child, the trier of fact should consider the following factors:

(1) the age of the child;

(2) the number of children left at the location;

(3) special needs of the child, including whether the child is

physically or mentally handicapped, or otherwise in need of ongoing prescribed medical treatment such as periodic doses of insulin or other medications;

(4) the duration of time in which the child was left without supervision;

(5) the condition and location of the place where the child was left without supervision;

(6) the time of day or night when the child was left without supervision;

(7) the weather conditions, including whether the child was left in a location with adequate protection from the natural elements such as adequate heat or light;

(8) the location of the parent, guardian, or other person having a duty imposed by marriage, court order or recognized state directive to care for the child, or having physical custody or control of the child at the time the child was left without supervision, the physical distance the child was from the parent, guardian, or other person having a duty imposed by marriage, court order or recognized state directive, or having physical custody or control of the child at the time the child was without supervision;

(9) whether the child's movement was restricted, or the child was otherwise locked within a room or other structure;

(10) whether the child was given a phone number of a person or location to call in the event of an emergency and whether the child was capable of making an emergency call;

(11) whether there was food and other provision left for the child;

(12) whether any of the conduct is attributable to economic hardship or illness and the parent, guardian or other person having physical custody or control of the child made a good faith effort to provide for the health and safety of the child;

(13) the age and physical and mental capabilities of the person or persons who provided supervision for the child;

(14) any other factor that would endanger the health or safety of that particular child; and

(15) whether the child was left under the supervision of another person.

(b) Knowledge. The offense of child abandonment requires that the accused have actual knowledge that the victim was then a child under the age of 9 years. It also requires that the accused had actual knowledge that he/she was leaving the victim without supervision by a person over the age of **12** years. Actual knowledge may be proved by circumstantial evidence. No other offense under this article includes an actual knowledge element.

d. Lesser-Included Offenses. None.

e. Maximum punishment.

(1) ***A child abandonment offense when the period of abandonment is 24 hours or more.*** Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(2) When a child neglect offense results in substantial harm to the child's physical, mental or emotional health. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(3) When a child neglect offense results in serious bodily injury to the child. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for ***5*** years.

(4) ***Other cases of child neglect.*** Bad conduct discharge, forfeiture of two-thirds pay per month for **3** months, and confinement for **3** months.

f. *Sample Specifications.*

(1) *Child Abandonment.*

In that _____ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required) on or about _____ 19—, [(as the parent of) (as the guardian of) (in loco parentis of) (having a duty imposed by marriage, court order or recognized state directive to care for) (having physical custody or control of)] _____ who then was and was then known by the accused to be a child under the age of 9 years, (willfully) (recklessly) (negligently) disregard said child's (person's) mental or physical health, safety or welfare, and then wrongfully and knowingly leave said child without supervision by a person over the age of 12 years [(for a period of **24** hours or more)]) [and said child suffered substantial harm to (his)(her) (physical) (mental) (emotional) health] [and said child suffered serious bodily injury, to wit: _____1.

(2) Child Endangerment.

In that _____ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 19—, [(as the parent of)(as the guardian of)(in loco parentis of)(having a duty imposed by marriage, court order or recognized state directive to care for) (having physical custody or control of)] _____ who then was a child under the age of 16 years, (willfully) (negligently) (recklessly) suffer said child [(to be injured, to wit: _____)] [(to be placed in a situation where said child's (life) (person) (health) was (likely to be) endangered, to wit: _____] [and said child suffered substantial harm to (his)(her) (physical) (mental) (emotional) health] [and said child suffered serious bodily injury, to wit: _____].

(3) *Criminal Deprivation of a Child (Necessities)*

In that _____ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 19—, (as the parent of) (as the guardian of) (in loco parentis of) (having a duty imposed by marriage, court order or recognized state directive to care for) (having physical custody or control of)] _____ who then was a child under the age of 16 years, (willfully) (negligently) (allow to be) deprive(d) said child of necessary (food) (clothing) (shelter) (medical attention) (education) and said deprivation did cause said child's (physical) (mental) (emotional) health (substantially likely) to be harmed [and said child suffered substantial harm to (his)(her) (physical) (mental) (emotional) health] [and said child suffered serious bodily injury, to wit: _____].

(4) Criminal Deprivation of a Child (Environment).

In that _____ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 19—, (as the parent of) (as the guardian of) (in loco parentis of) (having a duty imposed by marriage, court order or recognized state directive to care for) (having physical custody or control of)] _____ who then was a child under the age of 16 years, (willfully) permitted said child to live in a certain environment, to wit: _____, thereby causing, said child's (physical) (mental) (emotional) health (to be significantly impaired)(in danger of significant impairment) and said child suffered substantial harm

to (his)(her) (physical) (mental) (emotional) health] [and said child suffered serious bodily injury, to wit: _____].

Section 2. These amendments shall take effect on January XX, 19XX. Nothing contained in this amendment shall be construed to make punishable any act done or omitted prior to January XX, 19XX, which was not punishable when done or omitted.

Section 3. The Secretary of Defense, on behalf of the President, shall transmit a copy of this order to the Congress of the United States in accord with section 836 of Title 10 of the United States Code.

APPENDIX D

A BILL

To amend Title 18, United States Code, to provide penalties for child neglect in the special maritime and territorial jurisdiction of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION **1.** SHORT TITLE.

This Act may be cited as the "Child Neglect Act of 1996".

SECTION **2.** CHILD **ABANDONMENT;** CHILD ENDANGERMENT; CRIMINAL DEPRIVATION **OF A** CHILD

(a) IN GENERAL. — Chapter 110 of Title 18, United States Code, is amended by adding at the end of the following:

§ XXXXa. CHILD ABANDONMENT.

(a) Whoever, in the special maritime and territorial jurisdiction of the United States, as a parent, guardian, in loco parentis, or having a duty imposed by marriage, court order or recognized state directive, or other persons having physical custody or control of a child —

(1) with willful, negligent, or reckless disregard for the mental or physical health, safety or welfare of that child, knowingly leaves that child who is under the age of nine without supervision by a person over the age of twelve years.

(b) is guilty of child abandonment. The punishment for an offense under this section is—

(1) a fine under this title or imprisonment for not more than *3* months, or both;

(2) if the period of abandonment is **24** hours or more, a fine under this title or imprisonment for not more than 6 months, or both;

(3) if the offense results in substantial harm to the child's physical, mental or emotional health, a fine under this title or imprisonment for not more than **2** years, or both; or

(4) if the offense results in serious bodily injury to the child, a fine under this title or imprisonment for not more than **5** years, or both.

(c) In determining whether the conduct was done with willful, negligent, or reckless disregard for the mental or physical health, safety or welfare of that child, the trier of fact should consider the following factors:

(1) the age of the child;

(2) the number of children left at the location;

(3) special needs of the child, including whether the child is physically or mentally handicapped, or otherwise in need of ongoing prescribed medical treatment such as periodic doses of insulin or other medications;

(4) the duration of time in which the child was left without supervision;

(5) the condition and location of the place where the child was left without supervision;

(6) the time of day or night when the child was left without supervision;

(7) the weather conditions, including whether the child was left in a location with adequate protection from the natural elements such as adequate heat or light;

(8) the location of the parent, guardian, or other person having a duty imposed by marriage, court order or recognized state directive to care for the child or other person having physical custody or control of the child at the time the child was left without supervision, the physical distance the child was from the parent, guardian, or other person having a duty imposed by marriage, court order or recognized state directive to care for the child, or other person having physical custody or control of the child at the time the child was without supervision;

(9) whether the child's movement was restricted, or the child was otherwise locked within a room or other structure;

(10) whether the child was given a phone number of a person or location to call in the event of an emergency and whether the child was capable of making an emergency call;

(11) whether there was food and other provision left for the child;

(12) whether any of the conduct is attributable to economic hardship or illness and the parent, guardian or other person having physical custody or control of the child made a good faith effort to provide for the health and safety of the child;

(13) the age and physical and mental capabilities of the person or persons who provided supervision for the child;

(14) any other factor that would endanger the health or safety of that particular child; and

(15) whether the child was left under the supervision of another person.

§ XXXXb. CHILD ENDANGERMENT.

(a) Whoever, in the special maritime and territorial jurisdiction of the United States, as a parent, guardian, in loco parentis or having a duty imposed by marriage, court order or recognized state directive, or other persons having physical custody or control of a child—

(1) willfully, negligently, or recklessly causes or permits the life, person or health of that child to be injured,

or

(2) willfully, negligently, or recklessly causes or permits that child to be placed in such a situation where its life, person or health is endangered or likely to be endangered

is guilty of child endangerment and shall be punished as provided in subsection (b) of this section.

(b) The punishment for an offense under this section is—

(1) a fine under this title or imprisonment for not more than 6 months, or both;

(2) if the offense results in substantial harm to the child's

physical, mental or emotional health, a fine under this title or imprisonment for not more than *2* years, or both; or

(3) if the offense results in serious bodily injury to the child, a fine under this title or imprisonment for not more than *5* years, or both.

(c) As used in this section—

(1) the term "child" a person who has not yet attained the age of 16 years

(2) the phrase "substantial harm to the child's physical, mental or emotional health," includes, but is not limited to: starvation or failure to thrive or malnutrition

§ XXXXc. CRIMINAL DEPRIVATION OF A CHILD.

(a) Whoever, in the special maritime and territorial jurisdiction of the United States, as a parent, guardian, in loco parentis or having a duty imposed by marriage, court order or recognized state directive, or other persons having physical custody or control of a child—

(1) willfully or negligently deprives that child or allows that child to be deprived of necessary food, clothing, shelter, medical attention, education, and the deprivation harms or is likely to sustantially harm the child's physical, mental or emotional health,

(2) is guilty of criminal deprivation of a child and shall be punished as provided in subsection (b) of this section.

(b) The punishment for an offense under this section is—

(1) a fine under this title or imprisonment for not more than 6 months, or both;

(2) if the offense results in substantial harm or impairment to the child's physical, mental or emotional health, a fine under this title or imprisonment for not more than **2** years, or both; or

(3) if the offense results in serious bodily injury to the child, a fine under this title or imprisonment for not more than *5* years, or both.

(c) as used in this section—

(1) the term "child" is a person who has not yet attained the age of 16 years

(2) the phrase "substantial harm to the child's physical, mental or emotional health," includes, but is not limited to: starvation or failure to thrive or malnutrition

(3) "necessary education" means education as required by laws of the state

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 110 of title 18, United States Code, is amended by adding at the end the following new item:

"XXXXa. Child Abandonment."

"XXXXb. Child Endangerment."

"XXXXc. Criminal Deprivation of a Child."

APPENDIX E

DEPARTMENT OF DEFENSE
GENERAL ORDER

January XX 19XX
GO NUMBER 64001.x

SUBJECT Child Neglect

References:

(a) DOD Directive 6400.1, Family Advocacy Program, June **23,** 1992

(b) Public Law 101-647, "Crime Control Act of 1990, November 29, 1990

(c) Public Law 97-291, 'Victim and Witness Protection Act of 1982,"October 12, 1982

(d) DOD 5025.1-M, "DOD Directives System Procedures," December 1990, authorized by DOD Directive 5025.1, December 1988

(e) DOD Directive 1030.1, 'Victim and Witness Assistance," August 20, 1984

(f) DOD Directive 6025.6, "Licensure of DOD Health Care Personnel," June 6, 1988

(g) Title 10, United States Code, §§ 801-946

(h) DOD Directive 6025.11, "DOD Health Care Provider Credentials Review and Clinical Privileging," May 20, 1988

(i) Public Law 101-189, Title XV, Military Child Care Act of 1989, November 29, 1989

A. *PURPOSE*

1. This general order provides a single source of standards for parental responsibilities in determining child neglect. It publishes specific definitions of child abandonment, child endangerment, and deprivation of a child, for all DOD military service members.

2. A violation of this order implements punitive sanctions for military service members who commit child neglect.

3. This order does not supersede other DOD directives and service regulations pertaining to the family advocacy program except to the extent that child neglect is defined for criminal liability and made punitive. This order does not in any way modify or change, other DOD Directives and service regulations pertaining to the family advocacy program. The definitions and guidance in previous family advocacy program directives and service regulations will still serve as the basis for case reporting and substantiation, and program implementation.

4. A violation of this order does not create any right or benefit, substantive or procedural, enforceable at law by any person against the United States, its agencies, its officers or employees, or any other person.

B. *APPLICABILITY AND SCOPE*

This general order:

1. Applies to the Office of the Secretary of Defense (OSD) and the Military Departments. Military members assigned to the OSD, Chairman of the Joint Chiefs of Staff and the Joint Staff, the Unified and Specified Commands, the Inspector General of the Department of Defense, and the Defense Agencies [hereinafter referred to collectively as "the DOD components"] shall be covered by this directive and the regulations and policies issued by their parent military department to implement this order.

2. Applies to the United States Coast Guard, an agency under the Department of Transportation (DOT), by agreement with the DOT. This order shall also apply to the Coast Guard when it is operating as a military service in the Navy.

3. Encompasses all persons eligible to receive treatment in military medical treatment facilities.

4. The prohibitions and requirements set forth herein are general orders and apply to all military members without further implementation. Violations may result in prosecution under the UCMJ (reference (g)), as well as adverse administrative action and other adverse action authorized by the United States Code or federal regulations. Penalties for violating this order include the full range of statutory and regulatory sanctions, both criminal and administrative. This order may be the basis for a commissioned, warrant, or noncommissioned officer to issue a lawful order to a military service member.

C. *DEFINITIONS*

1. *Military Service Member or Personnel.*

(a) Any active duty Regular or Reserve military officer, including warrant officers.

(b) Any active duty enlisted member of the Army, Navy, Air Force, or Marine Corps.

(c) Any Reserve or National Guard member on active duty under orders issued pursuant to Title 10, United States Code.

(d) Any Reserve or National Guard member while on inactive duty for training or while earning retirement points, pursuant to Title 10, United States Code, or while engaged in any activity related to the performance of a federal duty or function.

2. *Child Neglect.* Acts or omissions that fall into the conduct described in section F below.

3. *Willfully.* Intentionally or on purpose.

4. *Negligently.* An act or failure to act by a person who is under a duty to use due care which demonstrates a lack of care for the child which a reasonably prudent person would have used under the same or similar circumstances.

5. *Recklessly.* A degree of carelessness greater than simple negligence. Recklessness is a negligent act or failure to act combined with a gross, deliberate, or wanton disregard for the foreseeable results to the person, life, or health of the child.

6. *Substantial harm to the child's physical, mental or emotional health.* As used in this order includes, but is not limited to starvation, failure to thrive, or malnutrition.

7. *Willful, negligent, or reckless disregard for the mental or physical health, safety or welfare of a child.* In determining whether the conduct was done with willful, negligent, or reckless disregard for the mental or physical health, safety or welfare of a child, (under child abandonment in section F below) the commander should consider the following factors:

(a) the age of the child;

(b) the number of children left at the location;

(c) special needs of the child, including whether the child is physically or mentally handicapped, or otherwise in need of ongoing prescribed medical treatment such as periodic doses of insulin or other medications;

(d) the duration of time in which the child was left without supervision;

(e) the condition and location of the place where the child was left without supervision;

(f) the time of day or night when the child was left without supervision;

(g) the weather conditions, including whether the child was left in a location with adequate protection from the natural elements such as adequate heat or light;

(h) the location of the parent, guardian, or other person having a duty imposed by marriage, court order or recognized state directive to care for the child, or other person having physical custody or control of the child at the time the child was left without supervision; the physical distance the child was from the parent, guardian, or other person having a duty imposed by marriage, court order or recognized state directive to care for the child, or other person having physical custody or control of the child at the time the child was without supervision;

(i) whether the child's movement was restricted, or the child was otherwise locked within a room or other structure;

(j) whether the child was given a phone number of a person or location to call in the event of an emergency and whether the child was capable of making an emergency call;

(k) whether there was food and other provision left for the child;

(l) whether any of the conduct is attributable to economic hardship or illness and the parent, guardian or other person having physical custody or control of the child made a good faith effort to

provide for the health and safety of the child;

(m) the age and physical and mental capabilities of the person or persons who provided supervision for the child;

(n) any other factor that would endanger the health or safety of that particular child; and

(o) whether the child was left under the supervision of another person.

D. *DOD POLICY*

It is DOD policy to:

1. prevent child neglect involving persons covered by section B above and deter those individuals from committing such acts falling under the category of child neglect.

2. Provide comprehensive and coordinated DOD-wide standards to identify child neglect and allow a method for criminal sanctions in the military.

3. Enhance family and unit morale, readiness, discipline by providing clear standards of parental responsibility.

4. Ensure parental responsibility for children thereby promoting the healthy development, well being, and safety of children in the military community.

5. Cooperate with civilian authorities in efforts to prevent, child neglect, deter persons from committing child neglect, and punish offenders.

6. Provide for violations of the standards set out herein to be punitive and where appropriate subject violators to disciplinary or administrative sanctions set out in the UCMJ or implementing service regulations.

E. *RESPONSIBILITIES*

1. The Assistant Secretary of Defense (Force Management and Personnel) shall monitor compliance with this general order.

2. The *Secretaries of Military Departments* shall:

(a) provide education and training to key personnel on this policy and effective measures to alleviate problems associated with child neglect.

(b) Ensure that military families living in the civilian community, as well as those living on the installation are aware of this order.

(c) Ensure commanders at all levels coordinate with the family advocacy case review committees prior to adverse administrative action or criminal sanctions.

F. *PROHIBITED CONDUCT*

No military service member, as a parent, guardian, in loco parentis or having a duty imposed by marriage, court order or recognized state directive or otherwise having physical custody or control of a child shall:

1. with willful, negligent or reckless disregard for that child's mental or physical health, safety or welfare, knowingly leave that child who is under the age of nine without supervision by a person over the age of twelve years (in so doing they commit child abandonment); or

2. willfully, negligently, or recklessly:

(a) allow or permit the life, person or health of that child, a person who has not yet attained the age of sixteen years, to be injured; or

(b) allow or permit that child, a person who has not yet attained the age of sixteen years, to be placed in a situation where its life, person or health is endangered or likely to be endangered (conduct described in 2(a) and (b) above is considered child endangerment); or

3. willfully or negligently deprive or allow to be deprived that child, a person who has not yet attained the age of sixteen years, of the necessary food, clothing, shelter, medical attention, education, and the deprivation harms or is likely to substantially harm the child's physical, mental or emotional health; or

4. willfully permit or allow that child, a person who has not yet attained the age of sixteen years of age, to live in an environment,

when such environment causes the child's physical, mental or emotional health to be significantly impaired or to be in danger of being significantly impaired. (conduct described in **3** and **4** above is considered deprivation of a child).

G. EFFECTIVE DATE AND IMPLEMENTATION

This order is effective immediately.

APPENDIX F

ARMY REGULATION—PUNITIVE PROVISIONS REGARDING CHILD NEGLECT

Applicability.

a. This regulation applies to—

(1) All members of the Active Army, including cadets at the United States Military Academy.

(2) All members of the United States Army Reserve on active duty pursuant to orders for more than **29** days.

(3) All members of the Army National Guard on active duty pursuant to orders under Title 10, United States Code for more than **29** days.

(4) Family members who are command sponsored and reside outside the United States.

b. Regarding soldiers, paragraph **X-3** of this regulation is punitive. A violation of paragraph **X-3** is separately punishable as a violation of a lawful general regulation under Article **92,** Uniform Code of Military Justice (UCMJ). Penalties for violating paragraph **X-3** include all applicable statutory and regulatory sanctions, both criminal and administrative.

X-1. Penalties

Personnel subject to the UCMJ who fail to comply with paragraph **X-3** are subject to punishment under the UCMJ, as well as to adverse administrative action and other adverse action authorized by applicable United States Code provisions or federal regulations. Paragraph **X-3** is fully effective at all times, and a violation of any provision of that paragraph is separately punishable as a violation of a lawful general regulation under Article **92,** UCMJ, even without prior commander's counseling. This paragraph and other provisions of this regulation may also be the basis for a commissioned, warrant, or noncommissioned officer to issue a lawful order to a soldier. Penalties for violations of the punitive provisions of this regulation, and orders issued based on these and other provisions of this regu-

lation, include the full range of statutory (including applicable state criminal statutes) and regulatory sanctions (See **X-2).**

X-2. Enforcement

a. Commanders should seek the Staff Judge Advocate's (SJA) advice concerning alternative actions to enforce compliance with, and punish violations of, this regulation under applicable federal, state, or foreign laws. Commanders also should notify appropriate law enforcement authorities when apprehension or criminal investigation is warranted.

b. Outside the United States, to enforce regulatory compliance, commanders will, in addition to other actions, recommend or initiate the following measures in appropriate cases—

(1) Terminate a civilian family member's command sponsorship and order their return to the United States;

(2) Request host-nation authorities remove a civilian family member from the host nation (in accordance with applicable international agreements and procedures). Prior to such action, however, commanders must revoke the civilian family member's command sponsorship and obtain legal advice from the SJA. Commanders only may release the civilian family member to the host nation with prior coordination with the SJA and military law enforcement authorities; and

(3) Curtail or deny extension of a soldier's tour of duty outside the United States.

c. Commanders will take appropriate actions against soldiers who violate this regulation or lawful orders issued based on this regulation. The following are some actions that commanders may take:

(1) Counseling or admonition;

(2) Memorandum of reprimand (filed in accordance with Army Regulation 600-37);

(3) Bar to re-enlistment;

(4) Administrative separation from the service;

(5) Nonjudicial punishment under UCMJ, Article 15; and

(6) Court-martial.

X-3. Child Neglect

a. A soldier who is a parent, guardian, in loco parentis or having a duty imposed by marriage, court order or recognized state directive or otherwise having physical custody or control of a child will not:

(1) with willful, negligent or reckless disregard for that child's mental or physical health, safety or welfare, knowingly leave that child who is under the age of 9 without supervision by a person over the age of 12 years (in so doing they commit child abandonment); or

(2) willfully, negligently, or recklessly:

(a) allow or permit the life, person or health of that child, a person under the age of sixteen years, to be injured (in so doing they commit child endangerment); or

(b) allow or permit that child, a person under the age of sixteen years, to be placed in a situation where its life, person or health is endangered or likely to be endangered (in so doing they commit child endangerment); or

(3) willfully or negligently deprive or allow to be deprived that child, a person under the age of sixteen years, of the necessary food, clothing, shelter, medical attention, education, and the deprivation harms or is likely to substantially harm the child's physical, mental or emotional health (in so doing they commit deprivation of a child); or

(4) willfully permit or allow that child, a person under the age of sixteen years of age, to live in an environment, when such environment causes the child's physical, mental or emotional health to be significantly impaired or to be in danger of being significantly impaired. (in so doing they commit deprivation of a child).

b. The following definitions apply to the above provision:

(1)*willfully.* Intentionally or on purpose.

(2) *Negligently.* An act or failure to act by a person who is under a duty to use due care which demonstrates a lack of care for the child which a reasonably prudent person would have used under the same or similar circumstances.

(3) *Recklessly.* **A** degree of carelessness greater than simple negligence. Recklessness is a negligent act or failure to act combined with a gross, deliberate, or wanton disregard for the foreseeable results to the person, life, or health of the child.

(4) *Substantial harm to the child's physical, mental or emotional health.* As used in this order includes, but is not limited to starvation, failure to thrive, or malnutrition.

(5) *willful, negligent, or reckless disregard for the mental or physical health, safety or welfare of a child* (applicable to the child abandonment provision above), In determining whether the conduct was done with willful, negligent, or reckless disregard for the mental or physical health, safety or welfare of a child, the commander should consider the following factors:

(a) the age of the child;

(b) the number of children left at the location;

(c) special needs of the child, including whether the child is physically or mentally handicapped, or otherwise in need of ongoing prescribed medical treatment such as periodic doses of insulin or other medications;

(d) the duration of time in which the child was left without supervision;

(e) the condition and location of the place where the child was left without supervision;

(f) the time of day or night when the child was left without supervision;

(g) the weather conditions, including whether the child was left in a location with adequate protection from the natural elements such as adequate heat or light;

(h) the location of the parent, guardian, or other person having a duty imposed by marriage, court order or recognized state directive to care for the child, or other person having physical custody or control of the child at the time the child was left without supervision; the physical distance the child was from the parent, guardian, or other person having a duty imposed by marriage, court order or recognized state directive to care for the child, or other person having physical custody or control of the child at the time the child was without supervision;

(i) whether the child's movement was restricted, or the child was otherwise locked within a room or other structure;

(j) whether the child was given a phone number of a person or location to call in the event of an emergency and whether the child was capable of making an emergency call;

(k) whether there was food and other provision left for the child;

(l) whether any of the conduct is attributable to economic hardship or illness and the parent, guardian or other person having physical custody or control of the child made a good faith effort to provide for the health and safety of the child;

(m) the age and physical and mental capabilities of the person or persons who provided supervision for the child;

(n) any other factor that would endanger the health or safety of that particular child; and

(o) whether the child was left under the supervision of another person.

c. This paragraph is punitive and commanders are responsible to enforce these provisions.

LACK OF EXTRATERRITORIAL JURISDICTION OVER CIVILIANS: A NEW LOOK AT AN OLD PROBLEM

MAJOR SUSAN S. GIBSON*

A military spokesperson in Burundi confirmed reports that the Army will take no action against Joseph Dac. Dac, a United States Army civilian employee, was being held for prosecution after he fatally shot a Jordanian UN peacekeeper and a United States Army Colonel. Dac was deployed to the Burundi peacekeeping mission to maintain complex military communications equipment. The murder weapon was a .9mm pistol that the Army issued to Dac for self-defense.

At a Pentagon briefing, the Army's top lawyer explained that the military could not try civilians by military court-martial except during a declared war. The Attorney General also confirmed that Dac could not be prosecuted in federal court. It seems that few laws have any effect outside the United States.

The UN Secretary General is demanding that the United States take steps to prosecute Dac. If the United States cannot or will not prosecute Dac, the Jordanian government is demanding that Dac be extradited to Jordan to stand trial for the murder of its peacekeeper.

The press release is fictional, but the problem is real. It is the same old problem that the military has been facing for over thirty-five years.[1] Unfortunately, the military keeps trying to solve it in the same old way—by extending federal court jurisdiction over civilians

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[1] *See, e.g.*, Reid v. Covert, 354 U.S. 1, 35 (1957).

during peacetime.[2] But, that solution, is targeted at the Army of the past rather than at the Army of the future.

This article looks at the problem of America's lack of extraterritorial jurisdiction over civilians accompanying the force, but looks at it with an eye on current military trends and deployments, and with a view to the future. The old problem arose in Cold War military garrisons in Germany and Japan; as a consequence, the old solutions target that problem. The problem continues to arise, however, in world-wide deployments during operations other than war. This article proposes a solution for those overseas military deployments, not for peacetime overseas garrisons.

These new military operations are conducted under constitutional war powers, and the new solution springs from that same power. The solution is limited in scope and grounded in military necessity. In *Reid v. Covert*,[3] the Supreme Court stated that "a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace."[4] For years, legal scholars have read this language as a prohibition against military jurisdiction over civilians. Read another way, it becomes a grant of authority — allowing military jurisdiction in the absence of a time of peace.

I. Introduction

This article begins with a brief description of the problem and the need for change. Next, it presents an historical overview of military jurisdiction over civilians. That history began in 1775 under the Articles of War. It then progressed to the Uniform Code of Military Justice (UCMJ), and covered the court cases that took away UCMJ jurisdiction over civilians. The article then discusses the current limits of extraterritorial federal court jurisdiction. The historical analysis ends with an examination of past and present proposals to regain extraterritorial jurisdiction over civilians.

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[2] H.R. 808, 104th Cong., 1st Sess. (1995); S. 74 104th Cong., 1st Sess. (1995); S. 288, 104th Cong., 1st Sess. (1995); H.R. 4531, 103d Cong., 2d Sess. (1994); S. 129, 103d Cong., 1st Sess. (1993); H.R. 5808, 102d Cong., 2d Sess. (1992); S. 182, 102d Cong., 1st Sess. (1991); S. 147, 101st Cong., 1st Sess. (1989); H.R. 255, 99th Cong., 1st Sess. (1985); S. 1, 94th Cong., 1st Sess. (1975) and H.R. 3907, 94th Cong., 1st Sess. (1975); S. 1744 & 1745, 92nd Cong., 1st Sess. (1971); H.R. 18857, 91st Cong., 2d Sess. (1970); H.R. 18548 & 18548, 91st Cong., 2d Sess. (1970); S. 2007, 90th Cong., 1st Sess. (1967); H.R. 226, 90th Cong., 1st Sess. (1967); S.761 & S.762, 89th Cong., 2d Sess. (1966). *See also Hearings Before Subcornrn. on Constitutional Rights of the Senate Judiciary Comm.*, 87th Cong., 2d Sess. 848-852 (1962) (Army presented draft legislation to Department of Justice to extend district court jurisdiction over civilians and ex-soldiers).

[3] 354 U.S. 1 (1957).

[4] *Id.* at 35 (quoting WILLIAM WINTHROP, MILITARY LAW **AND PRECEDENTS** (2d ed. 1920) [hereinafter WINTHROP]).

This article then describes the current problem. This problem is formed by three main forces: (1) new international tribunals and obligations to prosecute; (2) new military doctrines and deployments; and (3) a new reliance on civilian technicians during deployments. After defining the problem, the article discusses possible solutions to that problem. The problem can be addressed in two ways. First, it can be addressed by giving civilians the constitutional rights that the *Reid* Court required for peacetime prosecution, namely grand jury indictments, trial by jury, and Article III judges—in other words, trial in federal district court. The second option focuses on constitutional war powers and Article I courts-martial.

Finally, this article proposes a solution based on a limited but necessary expansion of court-martial jurisdiction over civilians deployed on military operations. The article concludes that the war powers of the President and the Congress will support this limited expansion of court-martial jurisdiction.

A. A *Time for Change*

The time for change has come for several reasons. The military has drastically reduced the number of military personnel and civilians assigned overseas. The Cold War strategy of overseas "forward presence" has been replaced by a "force projection" doctrine.[5] America has reduced its armed forces and left the military looking for ways to make a smaller force more effective. Technology is the answer.[6] Civilian technicians are necessary, however, to run and maintain these new high-tech weapons and systems. The military can no longer deploy a large force without also deploying civilian support personnel.[7]

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[5] *See, e.g.*, JOINT CHIEFS OF STAFF, NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA 6 (1995) [hereinafter NATIONAL MILITARY STRATEGY]; DEP'T OF ARMY, PROGRAM ANALYSIS AND EVALUATION DIRECTORATE, AMERICA'S ARMY—PROJECTING DECISIVE POWER 7 (1994) [hereinafter PROJECTING POWER]; DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS, ch. 3 (June 1993) [hereinafter FM 100-51.

[6] *See, e.g.*, THE FIRST INFORMATION WAR (Alan D. Campen ed. 1992); ALVIN & HEIDI TOFFLER, WAR AND ANTI-WAR (19931.

[7] *E.g.*, Elroy Garcia, *Storm Civilians*, SOLDIERS, Aug. 1991, at 10 (indicating approximately 1600 Army civilian employees deployed to Persian Gulf for Operations Desert Shield and Storm); Telephone Interview with Major Daniel M. Wiley, Office of the Deputy Chief of Staff for Personnel, Headquarters, Army Materiel Command (Mar. 13, 1995) (stating 169 Army Material Command (AMC) civilians deployed for Operation Vigilant Warrior in Persian Gulf, Fall 1994; 94 AMC civilians deployed to Haiti in 1994-95); Memorandum, Headquarters Third Infantry Div., Office of the Staff Judge Advocate, Nuremberg Law Center, to Judge Advocate, USAREUR and 7th Army, subject: After Action Report: Task Force Able Sentry (16 May 1994) [hereinafter AAR: Task Force Able Sentry] (indicating that at least two Army civilians deployed to the Former Yugoslav Republic of Macedonia).

Force projection is not the only change in the military's doctrine. America is now projecting its armed forces into operations other than war.[8] Many of these military operations can subject the United States to international obligations to investigate and prosecute violations of treaties or conventions.[9] Yet, many of these operations other than war fall into a legal gray area where the traditional law of war may not apply because there is no "international armed conflict" as defined by the Geneva Conventions.[10]

Force projection doctrine will put large units into foreign territory in four to twelve days. Military jurisdiction must be ready to project itself with that force, a force that includes a growing number of critical civilian personnel. The Army will not have time to negotiate extensive status of forces agreements, and any uncertainty or shortcomings in the military's jurisdictional doctrine will be magnified by the pace and complexity of tomorrow's military operations.

The fall of the Soviet Union brought new life to the United Nations (UN). The UN is now willing and able to step in and form international criminal tribunals when a nation-state either cannot or will not prosecute its citizens.[11] If the United States does not

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[8] *See, e.g.*, NATIONAL MILITARY STRATEGY, *supra* note 5, at 8-12; FM 100-5, *supra* note 5, ch. 13; JOINT CHIEFS OF STAFF, PUBLICATION 3-07, JOINT DOCTRINE FOR MILITARY OPERATIONS OTHER THAN WAR (1994).

[9] *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, art. 130, 6 U.S.T. 3316, 75 U.N.T.S. 134 [hereinafter Geneva POW Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, art. 147, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Civilians Convention]; *See also* similar articles in Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Shipwrecked Convention]; and Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Wounded Convention]. All Geneva Conventions of 1949 are reprinted in DEP'T OF ARMY, PAMPHLET 27-1, TREATIES GOVERNING LAND WARFARE (Dec. 1956) [hereinafter DA PAM. 27-1]. *See also Question of Responsibility for Attacks on United Nations and Associated Personnel and Measures to Ensure that Those Responsible for Such Attacks are Brought to Justice: Report of the Sixth Committee*, U.N. GAOR, 49th Sess., Agenda Item 141, U.N. Doc. A/49/742 (1994) [hereinafter UN Protection of Peacekeepers Convention]. The Convention on the Safety of United Nations and Associated Personnel, which was opened for signature on Dec. 2, 1994, is an annex to the report.

[10] *See, e.g.*, Geneva POW Convention, *supra* note 9, art. 2. All four Conventions have the same article 2 language: "[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties."

[11] *See, e.g., Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, U.N. SCOR, U.N. Doc. S/25704 (1993); *reprinted in* 32 I.L.M. 1159 (1993). The Security Council established the tribunal by resolution dated May 25, 1993; S. Res. 827; U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1203 (1993) [hereinafter Int'l Tribunal for Yugoslavia].

take steps to bring its civilians under its jurisdiction, the United States may have no choice but to turn those civilians over to an international tribunal.

The time is ripe for new legislation to expand court-martial jurisdiction over civilians deployed on military operations. America's deployments demand this solution, and the military justice system is now in a unique position to support that change, both constitutionally and politically. The 1984 amendments to the Uniform Code of Military Justice gave the Supreme Court direct review over all military cases.[12] In a series of cases since then, the Supreme Court has repeatedly shown its increasing regard for the military justice system.[13]

The Army's doctrine is changing, its deployments are changing, the military justice system has changed, and America's international obligations to prosecute are increasing. It is time for a new look at the problem of extraterritorial jurisdiction over civilians.

B. A *Brief Overview of Military Jurisdiction Over Civilians*

From 1775 to 1949, the Articles of War gave the military jurisdiction over civilians accompanying the forces in the field.[14] When the UCMJ was adopted in 1950, Article 2(a)(11) also gave the military jurisdiction over civilians accompanying the forces overseas.[15]

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[12]The Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, permitted direct petitions to the United States Supreme Court from the Court of Appeals for the Armed Forces. ***See*** *also* UCMJ art. 67a (1988). Previously, civil courts could only consider military habeas corpus petitions on the limited issues of jurisdiction and unlawful punishment. ***See*** Burns v. Wilson, 346 U.S. 137 (1953); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857).

Wee, *e.g.*, Weiss v. United States, 114 S. Ct. 752 (1994). "Today's decision upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history . . . ." *Id.* at 769 (Ginsburg, J. concurring).

[14]Article of War art. 32 (1775) provided that "[a]ll suttlers and retainers to a camp, and all persons whatsoever, serving with the continental army in the field, though not [e]nlisted soldiers, are to be subject to the articles, rules, and regulations of the continental army." Article of War art. 2(d) (1948) provided military jurisdiction over "[a]ll retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles." Intervening versions of the Articles of War had the same or similar language. ***See*** *also* WINTHROP, *supra* note 4, at 953 (appendix containing versions of the Articles of War from 1775 to 1892).

[15]UCMJ arts. 2(a)(10), 2(a)(11) (1950). These UCMJ provisions have not been changed since Congress enacted them in 1950. ***See*** UCMJ arts. 2(a)(10), 2(a)(11) (1988).

The 1950 changes to military jurisdiction reflected their times: a time of huge forward deployed military communities throughout Europe. The 1950 jurisdictional provisions over civilians clearly applied in peacetime, and they tied jurisdiction to the United States status of forces agreements.[16]

Starting in 1957, in a line of cases beginning with ***Reid*** *v. Covert,*[17] the Supreme Court declared UCMJ Article 2(a)(11) jurisdiction unconstitutional as applied to civilians during peacetime.[18] Thirteen years later, in a case involving a civilian employee in Vietnam, the United States Court of Military Appeals[19] struck the final blow by holding that UCMJ Article 2(a)(10) jurisdiction "during time of war" only attaches during a congressionally declared war.[20]

Since the courts decided those cases, scholars have written article after article analyzing the civilian jurisdiction cases and suggesting possible solutions.[21] Additionally, various members of Congress have introduced at least seventeen bills to regain jurisdiction

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[16]*See, e.g.*, Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA] *reprinted in* DEP'T OF ARMY, PAMPHLET 27-24, SELECTED INTERNATIONAL AGREEMENTS, VOL. II, at 2-1 (1976) [hereinafter DA PAM. 27-24].

[17]354 U.S. 1 (1957).

[18]*See id.* (no court-martial jurisdiction over dependent wives for capital offenses committed overseas in peacetime); Kinsella v. Singleton, 361 U.S. 234 (1960) (no court-martial jurisdiction over civilian dependents for noncapital offenses); Grisham v. Hagan, 361 U.S. 278 (1960) (no jurisdiction over civilian employees for capital offenses); McElroy v. Guagliardo, 361 U.S. 281 (1960) (no jurisdiction over civilian employees for noncapital offenses).

[19]Note that on October 5, 1994, the President signed into law Senate Bill 2182, Defense Authorization Act for Fiscal Year 1995, which redesignated the United States Court of Military Appeals as the United States Court of Appeals for the Armed Forces. *See* Nat'l. Def. Auth. Act for Fiscal year 1995, Pub. L. No. 103-337, 108 Stat. 2663, 2831 (to be codified at 10 U.S.C. § 941). This article will refer to the court by its name at the time of the decision.

[20]United States v. Averette, 19 C.M.A. 363, 41 C.M.R. 363 (1970).

[21]*See, e.g.*, Peter D. Ehrenhaft, *Policing Civilians Accompanying the United States Armed Forces Overseas: Can United States Commissioners Fill the Jurisdictional Gap?*, 36 GEO. WASH. L. R. 273 (1967); Robinson O. Everett & Laurent R. Hourcle, *Crime Without Punishment— Ex-Servicemen, Civilian Employees and Dependents*, 13 JAG L. REV. 184 (1971) [hereinafter Everett, *Crime Without Punishment];* Robinson *O.* Everett, *Military Jurisdiction Over Civilians*, 1960 DUKE L.J. 366 (1960) [hereinafter Everett, *Military Jurisdiction];* Robert Girard, *The Constitution and Court-Martial of Civilians Accompanying the Armed Forces—A Preliminary Analysis*, 13 STAN. L. REV. 461 (1961); Gregory A. McClelland, *The Problem of Jurisdiction Over Civilians Accompanying the Forces Overseas—Still With Us*, 117 MIL. L. REV. 153 (1987); Note, *Criminal Jurisdiction Over Civilians Accompanying American Armed Forces Overseas*, 71 HARV. L. REV. 712 (1958).

over civilians accompanying the forces overseas.[22] Without exception, these bills focus on gaining jurisdiction over civilians during peacetime, and they place that jurisdiction in the federal district courts.[23]

One current military proposal has shifted away from a peacetime federal court focus. This proposal will expand court-martial jurisdiction over civilians by changing the definition of "time of war" to a broader concept of "time of armed conflict."[24] While this effort is a step in the right direction, it does not go far enough. Many of the military's recent deployments are not international armed conflicts or any type of "armed conflict" in the traditional sense. There was no "enemy" in Rwanda or Haiti, and there was no armed conflict during Operation Desert Shield as the military prepared for Operation Desert Storm.

The military must take a new look at the problem of extraterritorial jurisdiction over civilians; it must identify the area of most need and focus its efforts there. This article will identify that area and define its limits.

II. The Rise and Fall of Court-Martial Jurisdiction over Civilians

Over the course of American history, the courts have considered military jurisdiction over civilians on a regular basis. This section chronicles that history. It begins with a explanation of the various types of military jurisdiction, and then focuses on court-martial jurisdiction over civilians under the Articles of War and the UCMJ. After discussing the point in history where the military lost jurisdiction over civilians, this section then examines the limits of extraterritorial federal jurisdiction over those civilians. Finally, it chronicles three recent efforts to expand jurisdiction over civilians: extending

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[22] H.R. 808, 104th Cong., 1st Sess. (1995); S. 74 104th Cong., 1st Sess. (1995); S. 288, 104th Cong., 1st Sess. (1995); H.R. 4531, 103d Cong., 2d Sess. (1994); S. 129, 103d Cong., 1st Sess. (1993); H.R. 5808, 102d Cong., 2d Sess. 11992); S. 182, 102d Cong., 1st Sess. (1991); S. 147, 101st Cong., 1st Sess. (1989); H.R. 255, 99th Cong., 1st Sess. (1985); S. 1, 94th Cong., 1st Sess. (1975) and H.R. 3907, 94th Cong., 1st Sess. (1975); S. 1744 & 1745, 92nd Cong., 1st Sess. (1971); H.R. 18857, 91st Cong., 2d Sess. (1970); H.R. 18548 & 18548, 91st Cong., 2d Sess. (1970); S. 2007, 90th Cong., 1st Sess. (1967); H.R. 226, 90th Cong., 1st Sess. (1967); S.761 & S.762, 89th Cong., 2d Sess. (1966). *See also Hearings Before Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 87th Cong., 2d Sess. 848-852 (1962) (Army presented draft legislation to Department of Justice to extend district court jurisdiction over civilians and ex-soldiers).

[23] *See id.*

[24] *Proposed Amendments to the Uniform Code of Militaly Justice, reprinted in* Dep't of Defense Legislative Reference Service, Misc. 2625(014) (Dec. 2, 1994 (9:30 am)) at 1-2 [hereinafter *Proposed UCMJ Amendments*]. This legislation was introduced in both the House and Senate as H.R. 1530, 104th Cong., 1st Sess. (1995) and S.1026, 104th Cong., 1st Sess. (1995). The Senate has recommended a study to be finalized by January 1997.

federal court jurisdiction? court-martial jurisdiction, and tribunal jurisdiction.

In many ways, the historical application of court-martial jurisdiction over civilians is "water under the bridge." A critical analysis of the history and precedents in this area will not change those precedents, regardless of how "right?'or logical that analysis may be.[25] This article will not argue whether the Supreme Court decisions were correct or incorrect; they are no longer open for argument. Rather, through a study of history and precedents, this article seeks to identify the constitutional limits of court-martial jurisdiction over civilians.

A. *Types of Military Jurisdiction*

There are four types of military jurisdiction: (1) military law, (2) martial law, (3) military occupation government, and (4) military tribunals.[26] All four types of jurisdiction are relevant to this article; however, its primary focus is on military law.

Military law is the purest form of military jurisdiction and is typified by the use of courts-martial to try members of the armed forces. Courts-martial are formed under Article I of the Constitution, which gives Congress the power to "make rules for the Government and Regulation of the land and naval Forces."[27] Since 1950, courts-martial have been governed by the Uniform Code of Military Justice.[28] Prior to the UCMJ, Army courts-martial were conducted in accordance with the Articles of War.

The second type of military jurisdiction, which is martial law, is often confused with courts-martial. Martial law is used during national emergencies *within the United States* and its territories. It supplants the civilian legal system and allows the military to try civilians in the area of the emergency.[29]

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[25] Many of the authors cited *supra* note 21 argued that the Supreme Court's civilian jurisdiction analysis was incorrect, and each of the Court's civilian jurisdiction cases contains strong and well-reasoned dissents. *See, e.g.,* Everett, *Military Jurisdiction, supra* note 21; McElroy v. Guagliardo, 361 U.S. 234 (1960) (consolidated concurring and dissenting opinions). However, over 35 years later, the precedents stand as law, regardless of the logic of these many arguments.

[26] MANUAL FOR COURTS-MARTIAL, United States, pt. I, Preamble, para. 2 (1984) [hereinafter MCM]. *See also* McClelland, *supra* note 21, at 161-62.

[27] U.S. CONST. art. I, § 8, cl. 14.

[28] Congress originally enacted the UCMJ on May 5, 1950, and it is contained in 64 Stat. 108, 50 U.S.C. §§ 551-736 (1952).

[29] *See, e.g.,* Duncan v. Kahanamoku, 327 U.S. 304 (1946) (defining limits of martial law imposed in Hawaii after attack on Pearl Harbor); *Ex parte* Milligan, 71 U.S. 2 (1866) (upholding martial law imposed in Indiana during Civil War). For a discussion of the distinction between military law and martial law, see *Ex parte* Jochen, 257 F. 200 (S.D. Tex. 1919).

Occupation law is the third type of jurisdiction. An occupying military force uses occupation law to supplement or to replace the civilian legal system. It is similar to martial law, except that martial law is exercised within the United States and occupation law is exercised in occupied foreign territory. The United States has tried United States citizens in occupied foreign territory;[30] however, the United States now rarely finds itself in the position of occupying power.[31]

The fourth type of jurisdiction is perhaps the most misunderstood. Military tribunals or military commissions are creatures of international law and are most often used to enforce the law of war. Military tribunals can try United States citizens[32] and foreign citizens.[33] Constitutionally, they find their way into American jurisprudence by way of the President's powers as Commander-in-Chief.[34]

B. Jurisdiction Over Civilians Under the Articles of War

From the time the first American Articles of War were adopted in 1775, civilians were subject to court-martial jurisdiction when they were accompanying the armed forces in the field. Numerous court cases and Judge Advocate General's Opinions expound upon the limits of this jurisdiction.

Article XXXII of the 1775 Articles of War provided that "[a]ll suttlers and retailers to a camp, and all persons whatsoever, serving

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[30] Madsen v. Kinsella, 343 U.S. 341 (1952) (upholding jurisdiction over US military wife tried by military commission in occupied Germany in 1950 for murder of her husband).

[31] 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 2, 36 Stat. 2277, T.S. No. 539, *reprinted in* DA PAM. 27-1, *supra* note 9, at 2. ('Territory is considered occupied when it is actually placed under the authority of the hostile army."). *But see* DEP'T OF DEFENSE, FINAL REPORT TO CONGRESS, CONDUCT OF THE PERSIAN GULF WAR 610 (1992) (indicating that coalition forces "acted briefly as an occupying power" in Iraq).

[32] *Ex parte* Quirin, 317 U.S. 1 (1942) (upholding tribunal over four German saboteurs taken into custody in New York City after landing by submarine; in habeas petition, one contended that he was a United States citizen and could not be tried by military commission; Court found his citizenship to be irrelevant).

[33] *In re* Yamashita, 327 U.S. 1 (1946) (upholding jurisdiction over Japanese general tried by military commission for violations of law of war committed in the Philippines during World War II).

[34] Madsen v. Kinsella, 343 U.S. 341, 348 (1952). For a discussion of the uses of military tribunals, *see* Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509 (1994); Mark S. Martins, National Forums for Punishing Offenses Against International Law: Might Our Own Soldiers Have Their Day in the Same Court?, Paper presented at the Conference on Deterring Humanitarian Law Violations, Charlottesville, Virginia (Nov. 5, 1994) (on tile with the Center for Law and Military Operations, The Judge Advocate General's School, Charlottesville, Virginia).

with the continental army in the field, though not [elnlisted soldiers, are to be subject to the articles, rules, and regulations of the continental army."[35] In 1806, Congress enacted the first complete revision of the Articles of War since the adoption of the Constitution.[36] Article 60 of the 1806 version was virtually identical to the 1775 Article.[37] Successive versions of the Articles of War contained similar provisions, which courts consistently interpreted to give the military court-martial jurisdiction over civilians who were accompanying the Army in the field.[38]

In 1916, the Articles of War expanded jurisdiction by granting court-martial jurisdiction over civilians accompanying the force overseas, even if they were not "in the field."[39] In addition, Article 2(d) provided jurisdiction during "time of war" over all "persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States."[40] Although both grants of jurisdiction remained in the Articles of War until Congress replaced them with the UCMJ in 1950,[41] only the "time of war" provision was ever tested in the federal courts.[42]

Under the Articles of War, the federal courts entertained several habeas corpus petitions on the issue of whether the military could try civilians by court-martial. Invariably, the answer was yes. If the courts found a lack of jurisdiction, it was either because a particular civilian did not fall within the meaning of "persons accompanying or serving with" the military or because the army was not "in the field."

In 1865, The Judge Advocate General opined that a Civil War contract surgeon was subject to military jurisdiction because he was "employed with the army in the field in time of war" even though he was "not a military officer and [had] no military rank or status."[43]

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[35] Art. of War art. XXXII (1775) *reprinted in* WINTHROP, *supra* note 4, at 954.

[36] Frederick B. Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1 (1958). *See also* WINTHROP, *supra* note 4, at 103.

[37] "All sutlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war." Art. of War, art. 60 (1806), *reprinted in* WINTHROP, *supra* note 4, at 980.

[38] WINTHROP, *supra* note 4, at 98.

[39] Art. of War (1916). *See also* FREDERICK B. WIENER, CIVILIANS UNDER MILITARY JUSTICE 227-31 (1967).

[40] Art. of War art. 2(d) (1948). The wording of Art. 2(d) was first adopted in the 1916 Articles of War.

[41] *See* Art. of War 1920 and 1948. *See also* WIENER, *supra* note 39, at 227-28.

[42] *See* WIENER, *supra* note 39, at 229 & n.8.

[43] Op. JAG, Army, *as digested in* Dig. Ops. JAG 1880, at 102. *See also* Hines v. Mikell, 259 F. 28, 34 (1919) (discussing the case of Dr. Bryan).

Following the Civil War, a federal court struck down court-martial jurisdiction over a contractor who was apparently charged with fraud.[44] In that case, the court held that a contractor providing supplies to the military did not have sufficient connections to the military to be tried by court-martial. The court did, however, endorse court-martial jurisdiction over "camp retainers" or others who "serve with the armies in the field."[45]

At about the same time, the Supreme Court decided ***Exparte Reed,*** a habeas corpus petition from a civilian Navy paymaster.46 Reed was charged with "malfeasance" in his duties as paymaster on the USS ***Essex,*** which was stationed off Brazil.[47] In upholding court-martial jurisdiction over Reed, the Court looked at Reed's connections to the Navy and found that if Navy paymasters "are not in the naval service, it may well be asked who are."[48]

During World War I, several civilians brought habeas corpus petitions to the federal courts to contest their court-martial convictions. In each case, the federal courts upheld the Article of War that granted court-martial jurisdiction over civilians. In ***Ex parte*** *Jochen*,[49] the judge succinctly summed up the state of the law: "That it is not necessary that a person be in uniform in order to be a part of the land forces, I think clear, not only upon considerations of common sense and common judgment, but upon well-considered and adjudicated authority."[50]

Jochen is a fairly typical case of the period. Jochen was serving as quartermaster with the Army in Texas, which was patrolling the Mexican border to protect against "German influences in Mexico."[51] Jurisdiction rested on the fact that Jochen was serving with the army in the field during a time of war.[52] The ***Jochen*** court recognized that the defendant would normally enjoy his constitutional right to a jury trial. However, the district court reasoned that under the Fifth Amendment, if Jochen was "a member of the land and

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[44]*Ex parte* Henderson, 11 F. Cas. 1067 (D. Ky. 1878) (No. 6349).

[45]*Id.* at 1069.

[46]100 U.S. 13 (1876)

[47]*Id.* at 20.

[48]*Id.* at 22. The Court also noted that Reed had signed a letter agreeing "to be subject to the laws and regulations for the government of the Navy and the discipline of the vessel." Justice Clark would later comment on this fact from ***Reed*** and propose that all civilians consent to court-martial jurisdiction as a condition of employment. McElroy v. Guagliardo, 361 U.S. 281, 286 (1960).

[49]257 F. 200 (S.D. Tex. 1919).

[50]*Id.* at 204.

[51]*Id.* at 202.

[52]Under Article 2 of the 1916 Articles of War, during wartime it was immaterial whether the service was within or outside of the United States.

naval forces Congress has the plenary power to subject him to military law, and the guaranties of the Constitution for trial by jury are wholly inapplicable."[53]

Numerous other cases from World War I produced the same result. Two civilian ship's cooks were court-martialed for desertion.[54] A civilian auditor working in the quartermaster office at Camp Jackson, South Carolina, was serving "in the field" and could lawfully be court-martialed.55 The World War I jurisdictional line was finally drawn in ***Ex parte Weitz***,[56] when the Army attempted to court-martial a government contractor's driver who was working for the contractor at Camp Devons, Massachusetts. In that case, the court found that Weitz's contacts with the Army were too remote to sustain jurisdiction.57

During World War II, the federal courts again routinely upheld the military's claims of jurisdiction over civilians. A district court upheld jurisdiction over Mr. DiBartolo, a civilian employee of Douglas Aircraft Company, for crimes he committed while on contract to maintain British and American aircraft in North Africa.[58] The Third Circuit also upheld Mr. Perlstein's court-martial conviction. Mr. Perlstein's case is unique because he committed his crimes after he was fired from his job and while the military was transporting him back to the United States.[59] Because of these unique facts, the case turned not on Perlstein's employment status, but on whether he was "accompanying the forces" within the meaning of Article 2.[60]

Although a cynic might think that the wartime cases were merely a reflection of their times, the federal courts took their constitutional responsibilities seriously. The following language reflects an attitude that is common in these cases:

It is in keeping with the traditions of this peace-loving

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[53]*Jochen*, 257 F. at 203.

[54]*Ex parte* Falls, 251 F. 415 (D.N.J. 1918); McCune v. Kilpatrick, **53** F. Supp. 80 (E.D. Va. 1943). In ***McCune,*** the court looked at the additional issue raised by the fact that McCune was never informed that he would be subject to military jurisdiction. The court was unmoved and held that his knowledge was irrelevant; all that mattered was that he was serving "in the field." *McCune*, 53 F. Supp. at 84-85.

[55]Hines v. Mikell, 259 F. 28 (4th Cir. 1919).

[56]256 F. 58 (D. Mass. 1919).

[57]*Id.* at 59. The court further explained that "[t]o hold otherwise would be to subject to military law a very large body of civilian employees, never directly coming in contact with military authority, and not heretofore generally supposed to be subject thereto." *Id.*

[58]*In* re DiBartolo, 50 F. Supp. 929 (S.D.N.Y. 1943).

[59]Perlstein v. United States, 151F.2d 167 (3d Cir. 1945).

[60]*Id.* at 169.

> nation that its civil courts should not readily surrender a civilian to the jurisdiction of the military. Expediency and even necessity should not dispense with a painstaking examination to determine whether one whose liberties the civil courts have been charged to guard inviolate has been properly brought to justice in a military tribunal.[61]

The courts upheld these wartime cases, not because they were abdicating their constitutional responsibility, but because these were *wartime* cases. War changes the scope of constitutional war powers,[62] and thereby changes the reach of court-martial jurisdiction.

C. Jurisdiction Over Civilians Under the UCMJ

Article 2(a) of the UCMJ grants jurisdiction over civilians in the following three situations:

> (10) In time of war, persons serving with or accompanying an armed force in the field.
>
> (11) Subject to any treaty or agreement . . . or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States . . . .
>
> (12) Subject to any treaty or agreement . . . or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States.. . .

Article 2(a)(11) was the first to come under constitutional attack. Article 2(a)(10) was then subjected to an attack of over-precise semantics. Article 2(a)(12) has lain dormant and presumed dead since the Supreme Court decisions striking down Article 2(a)(11). This article covers these provisions in the historical order

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[61] *DiBartolo,* 50 F. Supp. at 932. *See* also McCune v. Kilpatrick, 53 F. Supp. 80, 83-84 (E.D. Va. 1943). "The civil courts may not surrender a civilian to the jurisdiction of the military for expediency, convenience or even necessity, for to do so would destroy those constitutional rights and privileges guaranteed to citizens of this country." *Contra* Robert Girard, *The Constitution and Court Martial of Civilians Accompanying the Armed Forces—A Preliminary Analysis,* **13** STAN. L. REV. 461 (1961). According to Girard, the federal courts' "wartime acceptance of military jurisdiction seems too uncritical. Few explicitly considered the constitutional issues involved, and then only in the most fragmentary way." Id. at 498.

[62] *See, e.g.*, Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579 (1952); Korematsu v. United States, 323 U.S. 214 (1944); The Prize Cases, 67 U.S. (2 Black) 635 (1862).

of their judicial review rather than in the order they are presented in the UCMJ.[63]

*1. **Article** 2(a)(11)*—When Congress debated on and passed Article 2(a)(11) of the UCMJ, the Congressmen and scholars who testified did not see an expansion of jurisdiction over civilians. In fact, Article 2(a)(11) differs from Article 2 of the Articles of War only by the addition of the treaty or agreement provisions, and by the addition of the phrase "employed by." As we have seen, however, persons employed by the military were already being court-martialed under the Articles of War.

In the 1949 congressional debates on the UCMJ, Article 2(a)(11) did not generate much discussion. During one debate, Senator Kefauver noted that a wife who was accompanying her husband overseas would be subject to court-martial, "just as she is subject to [the Articles of War] today."[64]

It is with this history that the Supreme Court agreed to hear the habeas corpus petitions of Mrs. Covert and Mrs. Krueger, two military wives who were court-martialed for murdering their husbands—one in Germany and the other in Japan. Near the end of the Supreme Court's 1955-1956 term, the Justices considered these two challenges to Article 2(a)(11) in back-to-back arguments.[65] In both cases, the Court considered the argument that trial by court-martial denied these women their constitutional right to a jury trial. In both cases, the Court disagreed.

Writing for the Court in Covert and in ***Krueger,*** Justice Clark noted that courts-martial under the UCMJ included "the fundamental guarantees of due process."[66] He went on to note that these cases were tried outside United States territory and that it was "'clearly settled' that the constitutional provisions of Article III and the Fifth and Sixth Amendments 'do not apply to territory belonging to the United States which has not been incorporated into the Union.'"[67] Once Justice Clark decided that the Constitution did not

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[63] UCMJ art. 18 (1988) also grants court-martial jurisdiction over civilians "who by the law of war [are] subject to trial by a military tribunal." ***See supra*** notes 169-71 and accompanying text.

[64] 96 CONG. REC. 1360 (1950), ***reprinted in*** CONG. FLOOR DEBATE ON UNIFORM CODE OF MILITARY JUSTICE 202 (1949) (reprint available in the library of The Judge Advocate General's School, United States Army, Charlottesville, Virginia).

[65] Reid v. Covert, **351** U.S. 487 (1956); Kinsella v. Krueger, **351** U.S. 470 (1956). These two cases were consolidated for reargument the following year, and the Supreme Court reversed in Reid v. Covert, 354 U.S. 1 (1957). Throughout this article, the first cases will be indicated by the names **Covert** and ***Krueger,*** while the second, consolidated opinion will be indicated by the name *Reid.*

[66] *Krueger*, 351 U.S. at 474.

[67] *Id.* at 475 (quoting Balzac v. Puerto Rico, 258 U.S. 298, 304-05 (1922)).

apply outside the United States, he did not need to consider whether Congress could subject these civilians to courts-martial under its power to "make rules for the Government and Regulation of the land and naval Forces."[68] Congress could choose any means of trial that met the basic requirements of due process.[69]

Justice Frankfurter filed a reservation to the Court's opinions.[70] He was concerned about "the pressure under which the Court work[ed] during its closing weeks" that precluded a more thorough review of the issues.[71] He also mentioned the Court's failure to "rest its decision upon the congressional power 'To make Rules for the Government and Regulation of the land and naval Forces.'"[72] In a brief dissent, three additional Justices expressed their concern about the "far-reaching" consequences of these opinions.[73] They too wanted more time to consider the case and to write their dissents.[74] As it turned out, they never had the opportunity, or even the need, to do so.

In 1957, the Court consolidated the Covert and *Krueger* cases, and granted reconsideration. With more time, additional arguments, and a new Justice,[75] the Court reversed its prior position and struck down Article 2(a)(11) as it applied to civilian dependents accompanying the force who were tried by court-martial for capital offenses in peacetime.76

At the beginning of the Court's plurality opinion it "reject[ed] the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights."[77] With that said, the Court not only overturned its prior holdings, but it also set in motion a series of cases that would eat away at Article 2(a)(11) of the UCMJ, bite by bite.[78] Although there was no opinion of the Court in *Reid v.*

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[68] *Id.* at 476 (quoting U.S. CONST. art. I, § 8, cl. 14).

[69] *Id.* at 476.

[70] *Id.* at 481.

[71] *Id.* at 483-85.

[72] *Id.* at 482.

[73] *Id.* at 485-86.

[74] *Id.*

[75] Justice Brennan replaced Justice Minton prior to reargument.

[76] Reid v. Covert, 354 U.S. 1 (1957).

[77] *Id.* at 5.

[78] Kinsella v. Singleton, 361 U.S. 234 (1960) (no court-martial jurisdiction over civilian dependents for noncapital offenses) [hereinafter cited under name of Singleton to avoid confusion with Kinsella v. Krueger]; Grisham v. Hagan, 361 U.S. 278 (1960) (no jurisdiction over civilian employees for capital offenses); McElroy v. Guagliardo, 361 U.S. 281 (1960) (no jurisdiction over civilian employees for noncapital offenses). For an interesting discussion on how the order of the cases (dependent wife capital case first) possibly affected the outcome of the Court's reasoning, ***see*** Everett, Military Jurisdiction, *supra* note 21, at 411-12.

Covert,[79] by the time the Court took up the habeas corpus petitions in Kinsella *v. Singleton*[80] and two other civilian court-martial cases, the Court had reached a consistent five-member majority.[81]

Once the Court determined that the Constitution applied outside the United States, it undertook a constitutional review of court-martial jurisdiction over civilians. The Court's new constitutional analysis focused on Congress's Article I power to "make rules for the Government and Regulation of the land and naval Forces."[82] The Court reasoned that if the civilian cases fell within Congress's power to regulate the armed forces, Congress could make civilians "amenable to the Code."[83] If not, the civilians were entitled to "the safeguards of Article III and the Fifth and Sixth Amendments."[84]

As a result, the issue in each case was whether courts-martial of civilians accompanying the armed forces in time of peace were "cases arising in the land and naval Forces."[85] The Court saw this as an issue of "status, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.'"[86]

As in Reid, the Singleton Court concluded that dependent wives were not sufficiently connected with the military to "demonstrate a justification for court-martial jurisdiction."[87] Accordingly, it was not necessary for Congress to subject these women to court-martial to effectively "govern" the land and naval forces.[88]

Although the Court's "justification" language in Singleton

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[79]Justice Black announced the opinion of the Court, with Chief Justice Warren and Justices Douglas and Brennan joining; Justices Frankfurter and Harlan each concurred in the result; Justices Clark and Burton joined in dissent, and Justice Whittaker took no part in the case. *Reid*, 354 U.S. at 1.

[80]361 U.S. 234 (1960).

[81]Four Justices filed separate concurring and dissenting opinions. Justice Harlan, joined by Justice Frankfurter, dissented to the cases striking down jurisdiction in noncapital cases, and concurred in the cases striking down jurisdiction in the capital case. Justice Whittaker, joined by Justice Stewart, concurred in the case striking down jurisdiction over dependents and dissented in the cases striking down jurisdiction over employees. McElroy v. Guagliardo, 361 U.S. 234 (1960) (consolidated dissenting and concurring opinion for *McElroy*, *Singleton*, and ***Grisham)***. Interestingly, the majority opinions were written by Justice Clark, one of the dissenters in the second *Reid* case. By 1960, he apparently considered himself bound by stare decisis.

[82]*See Reid*, 354 U.S. at 19; *Singleton*, 361 U.S. at 248-49.

[83]*Singleton*, 361 U.S. at 247.

[84]*Id.* at 246.

[85]U.S. CONST. amend. V.

[86]*Singleton*, 361 U.S. at 241.

[87]*Id.* (quoting Justice Frankfurter's concurring opinion in *Reid*, 254 U.S. at 46-47).

[88]*Id.*

appeared to announce a balancing test that the military could meet by proving sufficient military connections and an adequate need for jurisdiction, the Court did not address that possibility in the civilian employee court-martial cases.[89] In Grishum *v. Hagan,*[90] a habeas corpus petition from a civilian employee charged with premeditated murder, the Court "carefully considered the Government's position as to the distinctions between civilian dependents and civilian employees."[91] The Court could not, however, find any "valid distinctions between the two classes of persons."[92]

In the companion case of McElroy *v. Guagliardo*,[93] the Court considered the issue of jurisdiction over civilian employees charged with noncapital offenses. The Court considered the historical "materials supporting trial of sutlers and other civilians by courts-martial,"[94] but found them "too episodic, too meager, to form a solid basis in history, preceding and contemporaneous with the framing of the Constitution, for constitutional adjudication."[95] Furthermore, the Court was unconvinced by the historical evidence of courts-martial of civilians during the Revolutionary Period. The Court found these courts-martial to be "inapplicable" because they occurred "during a period of war."[96] The courts-martial of civilians on the western frontier were disregarded for the same reason: they occurred "in a time of 'hostilities.'"[97]

In the remainder of the McElroy opinion, the Court undertook the seemingly legislative task of proposing other ways for the military to gain jurisdiction over these civilian employees. Justice Clark suggested that the military "follow a procedure along the line of that provided for pay-masters' clerks . . . in Ex Parte *Reed.*"[98] In *Reed*,[99] a civilian Navy paymaster had "agree[d] in writing 'to submit to the laws and regulations for the government and discipline of the navy.'"[100] The Reed Court did not, however, rely solely on Reed's

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[89]Justice Whittaker's concurring and dissenting opinion addressed many of the balancing concerns in the civilian employee cases: the closer ties with the military, the history of jurisdiction over civilian employees, and the "practical necessities and the lack of alternatives" to court-martial. *McElroy,* 361 U.S. at 259-77 (consolidated dissenting and concurring opinions).

[90]361 U.S. 278 (1960) (Grisham was found guilty of unpremeditated murder and sentenced to life).

[91]*Id.* at 280.

[92]*Id.*

[93]361 U.S 281 (1960).

[94]*Id.* at 284.

[95]*Id* (quoting *Reid,* 354 U.S. at 64 (Frankfurter, J. concurring!!.

[96]*Id.*

[97]*Id.* at 285-86.

[98]*Id.*

[99]100 U S . 13 (1879).

written agreement. The Court upheld jurisdiction over Reed because he was "in the naval service of the United States," as contemplated in the statute.[101]

Furthermore, as early as 1812 the Court recognized that Congress, through its constitutional powers, must give a court jurisdiction.[102] A defendant cannot give a court jurisdiction over himself.[103] A defendant may waive his right to a jury trial and waive other constitutional rights,[104] but unless Congress has granted court-martial jurisdiction over civilians there simply is no jurisdiction. The military may be able to fashion a contractual consent to trial by court-martial, but it is certainly not as simple as Justice Clark's opinion implies.[105]

Justice Clark then suggested that the military "incorporate those civilian employees who are to be stationed outside the United States directly into the armed services, either by compulsory induction or by voluntary enlistment."[106] This "solution" is also fraught with difficulties, both legal and practical.[107]

As a result of the *Reid* and *Singleton* line of cases, Article

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[100]*McElroy*, 361 U.S. at 285 (quoting *Ex parte* Reed, 100 U.S. 13, 19 (1879)).

[101]*Reed*, 100 U.S. at 21-22.

[102]United States v. Hudson and Goodwin, 10 U.S. (7 Cranch) 32 (1812). "Of all the Courts which the United States may . . . constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the constitution . . . . All other Courts created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer." *Id.* at 33.

[103]*See In re* Berue, 54 F. Supp. 252 (1944). "It is elementary that consent cannot confer jurisdiction." *Id.* at 256. This is why jurisdiction can always be raised on appeal; it is never "waived."

[104]Patton v. United States, 281 U.S. 276 (1930) (allowing defendant to waive his right to jury trial). Even though the Court will allow defendants to waive these rights at trial, the question remains whether the right to indictment and jury trial can be waived by contract. Waiver by contract would also raise other issues, such as whether the employee would have the right to the advice of counsel before signing the waiver or whether employment could be conditioned upon the waiver of these constitutional rights.

[105]The Court decided *Reed* in 1879, long before its cases concerning "knowing and voluntary" waivers of constitutional rights. *See also* Peter D. Ehrenhaft, *Policing Civilians Accompanying the United States Armed Forces Overseas: Can United States Commissioners Fill the Jurisdictional Gap?*, 36 GEO. WASH. L. REV. 273, 281 (1967) (discussing the problem of "advance waiver of procedural rights" and jurisdiction).

[106]McElroy v. Gualiardo, 361 U.S. 281, 286 (1960).

[107]Professor Everett made the following comment about Justice Clark's suggestion: "Thus, the culmination of a series of cases which express a desire to protect American citizens from the alleged abuses of courts-martial is the suggestion that more American citizens be drafted into the armed services, where they will be subject not only to courts-martial, but also to all other liabilities and responsibilities of a serviceman." Everett, *Military Jurisdiction, supra* note 21, at 409.

2(a)(11) has become an historical relic — unused since 1960. Although the military could try to use Article 2(a)(11) to gain jurisdiction over civilians deployed on overseas military operations, it would have to overcome forty years of intervening case law and failed legislation. As the following section shows, the military court's distinction between peacetime and wartime could pose a particular problem.

2. Article *2(a)(10)*—The practical demise of Article 2(a)(10) "time of war" jurisdiction came from the Court of Military Appeals (COMA) ten years after the completion of the Supreme Court's annihilation of Article 2(a)(11). Perhaps not so coincidentally, it also came only one year after the Supreme Court took military jurisdiction to an all-time low with O'Callahan *v. Parker.*[108]

In United States *v. Averette*,[109] the COMA considered the case of a contractor who was working for the Army in Vietnam. Averette was court-martialed under Article 2(a)(10)'s grant of jurisdiction over civilians serving with the force "in time of war." He was convicted "of conspiracy to commit larceny and attempted larceny of 36,000 United States Government-owned batteries."[110] The military court overturned Averette's conviction, holding that jurisdiction "in time of war'' required a congressionally declared war. In a surprisingly short opinion, the military court chronicled the history of jurisdiction over civilians, from the 1775 Articles of War, through Toth *v. Quarles*,[111] through the Reid cases, and on to O'Callahan. The military court then examined Latney *v. Ignatius,*[112] a 1969 habeas corpus petition heard by the United States Court of Appeals for the District of Columbia Circuit.

Latney was a civilian seaman living on board ship in DaNang harbor who was charged with fatally stabbing a shipmate during a bar fight in DaNang. The Latney court noted that the Reid cases were limited to peacetime, and that Vietnam was "a time of undeclared war which permits some invocation of the war power under which Article 2(a)(10) was enacted."[113] However, the district court struck down court-martial jurisdiction because "the spirit of

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[108]395 U.S. 258 (1969). In *O'Callahan*, the Court limited court-martial jurisdiction over service members to cases that were sufficiently "service-connected." In 1987, *O'Callahan* was overruled by Solorio v. United States, 483 U.S. 435 (1987), and the military once again exercised jurisdiction over service members based on their military status alone.

[109]41 C.M.R. 363 (C.M.A. 1970).

[110]*Id.* at 363.

[111]350 U.S. 11 (1955) (overturning court-martial jurisdiction over ex-serviceman for murder committed in Korea while on active duty; discharge from the military terminated military jurisdiction).

[112]416 F. 2d 821 (D.C. Cir. 1969).

[113]*Id.* at 823.

O'Callahan . . . precludes an expansive view of Article 2(10)."[114] The court then found Latney's military contacts to be too tenuous to support court-martial jurisdiction.[115]

While the military court did not find any of these cases individually controlling in ***Auerette,*** the court viewed the cases as signalling a new trend. The court clearly understood the Supreme Court's desire to limit military jurisdiction to ***"the least possible power adequate to the end*** *proposed."*[116] The court admitted that in prior cases it held that the Vietnam conflict was a "time of war" for other purposes, such as tolling the statute of limitations.[117] However, "[a]s a result of the most recent guidance in this area from the Supreme Court" (presumably *O'Callahan),* the court "believe[d] that a strict and literal construction of the phrase 'in time of war' should be applied."[118]

The ***Auerette*** holding continues to control military jurisprudence. Rule for Courts-Martial 103(19) now defines time of war as "a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that a 'time of war' exists."[119] During Operation Desert Storm, a court of military review relied on Rule for Courts-Martial 103(19) and held that the Persian Gulf conflict was not a "time of war" for court-martial purposes.[120]

Congress has not declared war since World War II. Since that time, nations have been reluctant to declare or admit to being "at war."[121] The UN Charter does not use the term "war"; rather, it

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[114]*Id.*

[115]*Id.*

[116]O'Callahan v. Parker, **395** U.S. **258, 265 (1969)** (quoting Toth v. Quarles, **350** U.S. **11, 22-23 (1955)).**

[117]*Averette,* **41** C.M.R. at **365.**

[118]*Id.*

[119]MCM, ***supra*** note **26,** R.C.M. 103(19). ***See*** *also* MCM, ***supra*** note **26,** R.C.M. 103(9) discussion (noting that "'time of war' as used in Article **106** may be narrower than in other punitive articles, at least in its application to civilians"). Along with jurisdiction over civilians, several other MCM provisions are affected by "time of war." Under Article **43,** the statute of limitations for several offenses is affected. Desertion (art. 85), disobedience of an officer (art. 90), and misbehavior of a sentinel (art. **113)** become capital offenses. Three offenses exist only during time of war: improper use of countersign (art. 101); misconduct as a prisoner (art. 105); and spying (art. **106).** 'Time of war" can also be used as an aggravating factor for sentencing in other articles.

[120]United States v. Castillo, **34** M.J. **1160, 1168** (N.M.C.M.R. **1992);** ***see also*** Message, Headquarters, Dep't of Army, DAJA-CL, subject: Time of War Under the UCMJ and MCM **(0819002** Feb **91)** ("For purposes of the UCMJ and the MCM, Operation Desert Storm, in and of itself, does not warrant a finding that time of war exists . . . .").

[121]*See* DEP'T OF ARMY, PAMPHLET **27-161-2,** INTERNATIONAL LAW, vol. I, **16-25** (Oct. 1962).

speaks in terms of "threats to peace" or "breaches of the peace."[122] In both the Persian Gulf conflict and Haiti, the UN gave member states the authority to "use all necessary means" to restore peace.[123] These were acts of "collective security" and not of any nation declaring "war" on another.

The days of a court taking judicial notice of the fact that the United States is "at war" are over.[124] Operations other than war and the delicacies of politics and diplomacy, particularly under the UN, preclude formal declarations of war and restrain the President in his ability to recognize a "time of war." Consequently, any jurisdictional provisions that apply only in "time of war" are obsolete.

3. Article 2(a)(12)—There is no record that the military has ever asserted jurisdiction over "persons within an area leased by or otherwise reserved or acquired for the use of the United States which is . . . outside the United States." If the military tries to use this article to court-martial civilians during peacetime, the *Reid* cases would certainly apply.

On an interesting note, in *United States v. Erdos*, the United States Court of Appeals for the Fourth Circuit extended federal court jurisdiction over a rented American Embassy compound in the Republic of Equatorial Guinea.[125] Although the language of *Erdos* appears to extend federal court jurisdiction over military installations overseas, there is no record that the military has ever tried to apply the *Erdos* precedent to those installations.

D. Extraterritorial Jurisdiction Under Federal ***Law***

As early as 1812, the Supreme Court confirmed that there is no common law criminal jurisdiction in the federal courts.[126] Only

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[122] U.N. CHARTER art. 1.

[123] S.C. Res. 940, U.N. SCOR, 3413th mtg., U.N. Doc. S/RES/940 (1994) (authorizing States to "form a multinational force" and "to use all necessary means" to return the "legitimately elected President" to Haiti); S.C. Res. 678, U.N. SCOR, 2963d mtg., U.N. Doc. S/RES/678 (1990) (authorizing member states to "use all necessary means . . . to restore international peace and security in the area").

[124] *See In* re Berue, 554 F. Supp. 252 (1944). In Berue, the court took "judicial notice of the fact that the United States of America [was] at war with the Axis Powers." *Id.* at 254.

[125] 474 F.2d 157 (4th Cir.), cert. *denied*, 414 U.S. 876 (1973). The court held that 18 U.S.C. § 7, which extends United States jurisdiction over "[any] lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof," granted jurisdiction over a United States citizen who was accused of murdering another citizen on embassy grounds.

[126] Hudson v. Goodwin, 10 U.S. (7 Cranch) 32, 33 (1812).

the Supreme Court "possesses jurisdiction derived immediately from the constitution."[127] The lower federal courts are created by Congress and they "possess no jurisdiction but what is given them by the power that creates them."[128]

In United States *v. Noriega,*[129] the district court set out a two-part test for claims of extraterritorial jurisdiction. The court must answer "1) whether the United States has the power to reach the conduct in question under traditional principles of international law; and 2) whether the statutes under which the defendant is charged are intended to have extraterritorial effect."[130]

Under part one of the test, Congress can reach the conduct of United States citizens abroad; the principle of jurisdiction based on nationality is firmly established in American and international law.[131] The question then becomes whether Congress intends to extend federal court jurisdiction over persons who commit crimes outside United States territory, Congress can extend this jurisdiction either expressly or by implication.[132]

Congress has passed several criminal statutes that apply within the "special maritime and territorial jurisdiction of the United States."[133] These statutes cover most common felonies such as assault, theft, robbery, murder, and manslaughter. However, they only apply on the high seas or other "waters within the admiralty and maritime jurisdiction of the United States," on "lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof," on federal lands within the United States, in United States aircraft flying over the seas, and in spacecraft.[134]

Many attorneys are surprised to find that the United States cannot generally try citizens for felonies they commit on foreign territory. For confirmation, one need only look back to the public outcry and related writings after My Lai, when several ex-servicemen were

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[127] *Id.*

[128] *Id.*

[129] 746 F. Supp. 1506 (S.D. Fla. 1990).

[130] *Id.* at 1512.

[131] *See, e.g.*, Skiriotes v. Florida, 313 U.S. 69, 73 (1941) ("The United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed."). See *also* Lauritzen v. Larsen, 345 U.S. 571 (1953); *Noriega,* 746 F. Supp. at 1512 n.4, and authorities cited therein.

[132] United States v. Bowman, 260 U.S. 94 (1922).

[133] 18 U.S.C.A. § 7 (West 1994).

[134] *Id.*

not prosecuted for the murders of Vietnamese civilians because no United States court had jurisdiction.[135] As the law stands, if a United States national cannot be tried by the foreign country where he commits the crime, he "may escape punishment altogether."[136] When Justice Black acknowledged this fact in 1955 in *Toth v.* Quarles, he also noted that jurisdiction was lacking "only because Congress has not seen fit to subject them to trial in federal district courts."[137]

Some statutes have express or implied extraterritorial application through the theory of long-arm jurisdiction. For these offenses, it is the locus of the effect of the crime that matters and not where the crime originated. The Supreme Court recognized this theory as early as 1804.[138] Unfortunately, most common felonies are crimes against persons that only "affect the peace and good order of the community" where they are committed.[139] According to the Supreme Court, if Congress wants statutes outlawing common felonies to have extraterritorial application, "it is natural for Congress to say so in the statute."[140]

E. Efforts to Extend Jurisdiction over Civilians

1. Extending Federal Court Jurisdiction — Since 1962, legislators have repeatedly introduced bills to extend jurisdiction over civilians and ex-service members,[141] the military has conducted

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[135] *See generally* Everett, *Crime Without Punishment, supra* note 21; Note, *Jurisdictional Problems Related to the Prosecution of Former Servicemen for Violations of the Law of War*, 56 VA. L. REV. 947 (1970); *Cf.* Jordan Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, *50* TEX. L. REV. 6 (1971). Paust argues that a "federal district court may apply the international law of war under existing statutes to trials of civilians."

[136] Toth v. Quarles, 350 U.S. 11,20 (1955).

[137] *Id.* at 21.

[138] Church v. Hubbart, 6 U.S. (2 Cranch) 187 (1804). Perhaps the most famous recent application of long arm jurisdiction was seen when the United States tried Panamanian General Manuel Noriega in federal court for an "international conspiracy to import cocaine . . . into the United States." United States v. Noriega, 746 F. Supp. 1506, 1510 (S.D. Fla. 1990).

[139] United States v. Bowman, 260 U S . 94, 98 (1922).

[140] *Id.* Congress has passed some criminal statutes that have extraterritorial effect, but they tend to be limited in scope. *See, e.g.*, 18 U.S.C.S. § 1116 (Law. Co-op. 1994) (murder of internationally protected persons); 18 U.S.C.S. § 2331 (Law. Co-op. 1994) (international terrorism); 18 U.S.C.A. § 7 (West 1994) (special maritime and territorial jurisdiction).

[141] *See* bills cited *supra* note 2.

lengthy studies,[142] and legal scholars have written numerous articles addressing this jurisdictional void.[143] However, the void remains.

In 1995, legislators introduced three bills to extend federal court jurisdiction over service members and civilians serving with or accompanying the military outside the United States. Each of these bills would give the military the authority to arrest civilians for any of the "special maritime and territorial jurisdiction'' offenses and to turn those civilians over to the United States or to the host nation for trial.[144]

Even if Congress passes any of these bills, the United States would still face many practical problems in federal court. A federal court subpoena would not reach foreign witnesses and evidence, and the United States would have to use extradition treaties or other means to return the offenders to the United States for trial.[145]

2. Extending Court-Martial Jurisdiction — In 1982, The Judge Advocate General of the Army established the Wartime Legislation Team to study the application of military law during combat operations.[146] For twelve months, the team conducted an extensive review of military justice[147] and made various recommendations, including several to extend court-martial jurisdiction over civilians and ex-soldiers.[148] None of these jurisdictional suggestions became law.

Currently, the military is proposing legislation to change the "in time of war" language in UCMJ Article 2(a)(10).[149] This change would extend court-martial jurisdiction over "persons serving with or accompanying an armed force in the field" during a time of

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[142] *See, e.g.*, Audit Report, Dep't of Defense Office of the Inspector General, Report 91-105, subject: Civilian Contractor Overseas Support During Hostilities (June 26, 1991); E.A. Gates & Gary V. Casida, Report to the Judge Advocate General by the Wartime Legislation Team (Sept. 1983) (unpublished report, on file with The Judge Advocate General's School, United States Army, Charlottesville, Virginia) [hereinafter WALT Report].

[143] *See* sources cited *supra* note 21. *See also* Paust, *supra* note 135; Note, *Jurisdictional Problems Related to the Prosecution of Former Servicemen for Violations of the Law of War*, *supra* note 135.

[144] S. 74, 104th Cong., 1st Sess. (1995); S. 288, 104th Cong., 1st Sess. (1995); H.R. 808, 104th Cong., 1st Sess. (1995).

[145] *See infra* notes 318-27, 333-38 and accompanying text.

[146] E. A. Gates and Gary V. Casida, *Report to the Judge Advocate General by the Wartime Legislation Team*, 104 MIL. L. REV. 139 (1984).

[147] The full report, with all appendices, is over four inches thick. WALT Report, *supra* note 142.

[148] Gates and Casida, *supra* note 146, at 148.

[149] *Proposed UCMJ Amendments*, *supra* note 24.

"armed conflict." As proposed, "armed conflict" is defined as military operations "against an enemy" or "against an organized opposing foreign armed force regardless of whether or not a war or national emergency has been declared by the President of the United States or the Congress."[150]

This proposed change is an attempt to bypass the COMA's holding in *Averette* that the Vietnam conflict was not a "time of war" for jurisdictional purposes.[151] Although the change will cover some of the military's recent deployments, it still leaves a jurisdictional gap during most peace operations, humanitarian missions, and other operations other than war where there is no "enemy."[152] It also leaves a gap during foreign military buildups such as Operation Desert Shield, where the military deployed 1260 civilians to Saudi Arabia long before the military engaged in military operations "against an enemy" or an "opposing foreign armed force."[153]

3. Extending Tribunal Jurisdiction — When the UN recently established an international tribunal to prosecute violations of international humanitarian law in the former Yugoslavia,[154] the subject of using national military tribunals came back into the legal debate.[155] Although the Supreme Court has sanctioned the use of American military tribunals to prosecute civilians,[156] these cases point out that military tribunals "have been constitutionally recognized agencies for meeting many urgent governmental responsibili-

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[150] *Id.*

[151] United States v. Averette, 41 C.M.R. 363 (C.M.A. 1970).

[152] Haiti changed from a military operation "against an enemy" to a peacekeeping operation while personnel were in the air en route to Haiti. See, *e.g.*, Mission to Haiti; *Words* of Clinton *and* His *Envoys:* A Chance to Restore Democracy, N.Y. TIMES, Sept. **20,** 1994, at A14.

[153] There were 799 civilian contractors and 461 Department of the Army civilians deployed on Operation Desert Shield between November 1, 1990, and January 15, 1991. Logistics Management Institute, Contractor Support During Operation Desert Shield/Storm, briefing slides, Lieutenant General Mears (10 May 1993) (on file with Office of the Deputy Chief of Staff for Logistics, Director of Plans and Operations, DALO-PLP, United States Army, Pentagon) [hereinafter Contractor Support].

[154] *See* Int'l Tribunal for Yugoslavia, supra note 11.

[155] *See* generally Everett & Silliman, supra note 34; Martins, supra note 34. In November 1994, the University of Virginia School of Law Center for National Security Law and the Duke University School of Law Center on Law, Ethics and National Security cosponsored a forum on "Deterring Humanitarian Law Violations: Strengthening Enforcement." One of the panel discussions focused on National Tribunals and Military Commissions as an enforcement mechanism. Panel Discussion, Presenter, Robinson O. Everett, Discussants Lieutenant Colonel Steven Lepper and Major Mark Martins, at The Judge Advocate General's School. Charlottesville, Virginia (Nov. 5, 1994).

[156] Madsen v. Kinsella, 343 U.S. 341 (1952); *Ex parte* Quirin, 317 U.S. 1 (1942).

ties *related to war*."[157] Indeed, every modern court-sanctioned use of military tribunals and commissions has been during a declared war[158] or military occupation following war.[159]

The power to convene military tribunals stems from the war powers and the international law of war,[160] and those tribunals are authorized to try persons for violations of the law of war.[161] Military tribunals have not been tested during military operations other than war. However, if they derive their legitimacy from the President's war powers and if they are formed to enforce the law of war, by definition they are subject to the existence of an "enemy" and an "international armed conflict." Without these, arguably there is no international law of war to enforce.[162]

The military's current operations call for numerous overseas deployments that may not support the use of military tribunals. Nation assistance, peacekeeping, humanitarian assistance, disaster relief, and security assistance are all listed in the Army's operations manual.[163] None of these operations involve "armed conflict," and they do not trigger the international law of war.

It is also unlikely that the United States military will soon find itself in a military occupation where it could set up an occupa-

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[157] *Madsen*, 343 U.S. at 346 (emphasis added).

[158] *Quirin*, 317 U.S. at 1 (upholding military commission trial of German saboteurs); *In re* Yamashita, 327 U.S. 1 (1946) (upholding military commission trial of Japanese General for war crimes).

[159] *Madsen*, 343 U.S. 341 (upholding trial of military wife by military commission in occupied Germany). The Court noted that the "President has the . . . responsibility . . . of governing any territory occupied by the United States by force of arms." *Id.* at 348.

[160] Duncan v. Kahanamoku, 327 U.S. 304 (1946). In *Duncan*, the Court was examining the use of martial law to try United States civilians in Hawaii during World War II. In narrowing the issue, the Court recognized the "well-established power of the military to exercise jurisdiction over . . . [persons] charged with violating the laws of war. We are not concerned with the recognized power of the military to try civilians in tribunals established as a part of a temporary military government over occupied enemy territory . . . ." *See also Madsen*, 343 U.S. at 341; *Yamashita*, 327 U.S. at 1; *Quirin*, 317 U.S. at 1.

[161] *See* sources cited *supra* note 160. *See also* UCMJ art. 18 (1988) ("courts-martial also have jurisdiction to try any person who *by the law of war* is subject to trial by a military tribunal") (emphasis added)); UCMJ art. 106 (1988) ("Any person who *in time* of *war* is found . . . acting as a spy . . . shall be tried by a general court-martial or by a military commission . . . .") (emphasis added)).

[162] The Geneva Conventions of 1949 apply "to all cases of declared war or of any other armed conflict which may arise between two or more" states. Geneva POW Convention, *supra* note 9, art. 2; Geneva Civilians Convention, *supra* note 9, art. 2. The same language is found in art. 2 of all four conventions.

[163] FM 100-5, *supra* note 5, ch. 13; *see also* DEP'T OF ARMY, FIELD MANUAL 100-23, PEACE OPERATIONS (Dec. 1994) [hereinafter FM 100-23].

tion tribunal.[164] Occupation "presupposes a hostile invasion."[165] The invader then "substitute[s] its own authority for that of the legitimate government in the territory invaded."[166] When a foreign nation invites the United States military into its territory for peacekeeping, humanitarian assistance, or nation assistance, the United States is not a "hostile invader,'' nor does it seek to replace the existing government's authority with its own.

Additionally, the cases upholding the use of tribunals over United States citizens not only occurred during declared war or occupation, but they also occurred before the Court's decision in *Reid*. Prior to *Reid*, the Court was of the opinion that the Constitution had little extraterritorial application.[167] If the military attempted to try United States citizens by military tribunal today, it is possible that the Court would apply the *Reid* reasoning and overturn the convictions.[168]

Article 18 of the UCMJ also grants courts-martial jurisdiction over "any person who by the law of war is subject to trial by a military tribunal."[169] The military is more likely to use Article 18 to court-martial a civilian than to go through the process of forming a military tribunal. If the military court-martialed a civilian under Article 18, the military courts could read the "law of war" language in Article 18 to require a congressionally declared war in accordance with Averette.[170] To date, Article 18 remains untested.

As the law stands, the military cannot court-martial civilians

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[164]The coalition forces were technically "occupiers" in Iraq during the Persian Gulf conflict. DEP'T OF DEFENSE, FINAL REPORT TO CONGRESS, CONDUCT OF THE PERSIAN GULF WAR 610 (1992). However, the military did not set up any occupation courts or military tribunals. If current events are any indication, future tribunals will be conducted under UN auspices, particularly for UN operations.

[165]DEP'T OF *ARMY*, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 355 (July 1956) [hereinafter FM 27-10].

[166]*Id.*

[167]*See In re* Ross, 140 U.S. 453 (1891).

[168]Constitutionally, tribunals do not have the same legitimacy as courts-martial. Tribunals are formed under the President's authority as Commander-in-Chief. Courts-martial are formed under Congress's express Article I power to regulate the military *and* conducted pursuant to rules promulgated by the President under his authority as Commander-in-Chief. Because the President and Congress act together to form courts-martial, courts-martial have greater constitutional validity than tribunals. ***See generally*** Youngstown Sheet and Tube **v.** Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, **J.** concurring).

[169]UCMJ art. 18 (1988). ***See*** *also* UCMJ art. 21 (1988) ("The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.").

[170]United States v. Averette, 41 C.M.R. 363, 365 (C.M.A. 1970).

under Article 2(a)(10) in the absence of a declared war. The military cannot court-martial civilians under Article 2(a)(11) or (12) in peacetime because of the *Reid* line of cases. Military tribunals may be an option, but at best they can only be used during international armed conflict to enforce the law of war.[171] There are few federal laws that reach into foreign territory, and trial in federal court is fraught with practical and legal difficulties.

III. Why is Lack of Jurisdiction a Problem?

A. *The International Trend—Obligations to Prosecute*

1. The Geneva Conventions and Protocol I—Each of the Geneva Conventions requires their signatories "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention."[172] Each nation must also search for persons who may have committed grave breaches of the conventions and bring those persons "before its own courts."[173] If a nation prefers, it may allow the person to be tried by another nation. In either event, the intent of the Geneva Conventions is clear: the United States must prosecute or extradite any person who has allegedly committed a grave breach of the Conventions.[174] Protocol I to the Geneva Conventions also requires military commanders to take action against

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[171] *Cf.* Everett & Silliman, *supra* note **34,** at **510.** The authors theorize that tribunals can be used during peacekeeping and peace-enforcement operations. However, the use they advocate is limited to prosecuting foreign nationals. Note also that "war crimes" is a very narrow class of crimes under the Geneva Conventions. Crimes against United States coalition-forces personnel or friendly host nation personnel do not constitute "war crimes" (e.g., if a United States civilian shot a Saudi soldier or Kuwaiti civilian during Operation Desert Storm, it would not be a war crime).

[172] Geneva POW Convention, *supra* note **9,** art. **129.** The other three Conventions contain identical language. Geneva Civilians Convention, *supra* note **9,** art. **146;** Geneva Shipwrecked Convention, *supra* note **9,** art. 50; Geneva Wounded Convention, *supra* note **9,** *art.* **49.**

[173] *See* Geneva Conventions at articles cited *supra* note 172. Grave breaches are offenses such as murder, torture, willful assault, depriving a POW or a civilian of a fair trial, and unlawful deportation or transfer of civilians. ***See, e.g.,*** Geneva POW Convention, *supra* note **9,** art. **130;** Geneva Civilians Convention, *supra* note **9,** art. **147.**

[174] *Id. See also* PICTET, COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, INTERNATIONAL COMMITTEE OF THE RED CROSS, GENEVA **590-94 (1958).** "Most national laws and international treaties . . . refuse the extradition of accused who are nationals of the State detaining them. In such cases Article **146** clearly implies that the State detaining the accused person must bring him before its own courts." PICTET, *supra,* at **593.**

persons "under their command and *other persons under their control"* who violate the Geneva Conventions or Protocol I.[175]

When the Senate ratified the Geneva Conventions in 1955, the Department of Justice informed the Senators that the requirement to enact legislation "can be met by existing legislation enacted by the Federal Government within its constitutional powers."[176] The powers listed were the power to "define and punish . . . offenses against the law of nations,"[177] and the power "to make rules for the government and regulation of the land and naval forces."[178]

Presumably, the Department of Justice was relying on the UCMJ to fulfill the United States obligations under the Geneva Conventions. After all, in 1955 the military could court-martial civilians accompanying the forces, and the UCMJ does criminalize most, if not all, of the Geneva Convention grave breaches.[179] Currently, the *Reid* cases and *Averette*[180] have foreclosed most courts-martial of civilians in the absence of a declared war. Furthermore, without a declared war, *Reid* and *Averette* may prevent the military from using military tribunals or courts-martial to prosecute United States civilians for war crimes as provided in UCMJ Article 18.

The United States takes the position that civilians accompanying its armed force receive protection under the Geneva Conventions as prisoners of war,[181] and commanders are instructed

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[175]Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, art. 87, 16 I.L.M. 1391, 1125 U.N.T.S., (emphasis added) [hereinafter Protocol I], *reprinted in* DEP'T OF ARMY, PAMPHLET 27-1-1, PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Sep. 1979). The United States signed Protocol I on December 12, 1977, subject to three understandings that are not relevant here. The United States has not yet ratified Protocol I. In 1993, the United States promised to review the decision not to ratify Protocol I, and a review is ongoing. Int'l Law Div. Note, *Law of War Treaty Developments,* ARMY LAW., Aug. 1994, at 57.

[176]REPORT OF THE COMMITTEE ON FOREIGN RELATIONS, GENEVA CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS, S. EXEC. REP. NO. 9, 84th Cong., 1st Sess. at 27 (1955).

[177]U.S. CONST., art. I, § 8, cl. 10.

[178]*Id.* art. I, § 8, cl. 14.

[179]*Cf.* HOWARD S. LEVIE, TERRORISM IN WAR—THE LAW OF WAR CRIMES (1993). "One wonders what presently extant provision of Federal criminal law provides for punishing a person who is charged with 'compelling a prisoner of war to serve in the forces of a hostile Power, or willfully depriving a prisoner of war of the rights of fair and regular trial'. . . ." *Id.* at 237.

[180]United States v. Averette, 41 C.M.R. 363 (C.M.A. 1970) (holding that UCMJ art. 2 "time of war" jurisdiction requires congressionally declared war).

[181]UNITED STATES ARMY MATERIEL COMMAND, AMC CIVILIAN DEPLOYMENT GUIDE 41 (Mar. 1994) [hereinafter AMC CIVILIAN DEPLOYMENT GUIDE]. This position is supported by the language in art. 4, para. A(4) of the Geneva POW Convention, *supra* note 9, which states that "[p]ersons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war

to provide those civilians with Geneva Convention identification cards.[182] Consequently, the United States could find itself in an embarrassing international incident: demanding Geneva Convention protections for civilians, while at the same time not taking the appropriate steps to ensure that it can comply with the Conventions' requirements with respect to controlling these same civilians. Granted, the Geneva Conventions allow the United States to turn the offenders over to a third signatory state for trial.[183] However, the problem of choosing another "appropriate" country could create an international incident of its own.

2. Other International Obligations *to* Prosecute — Recent world events are accelerating the pace of UN deployments. Multinational deployments with a multitude of missions are the order of the day. **As** the UN and the world community move to bring order to troubled nations, there is a corresponding trend to bring the law and criminal responsibility to transgressing individuals.

This section outlines some of the international agreements that seek to increase individual responsibility. Each agreement calls for nation-states to prosecute transgressors or to turn them over to a party who will prosecute. Each agreement or proposal is more far-reaching than the last.

a. Internationally Protected Persons — The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons is a **1973** multilateral agreement that provides for the protection of heads of state, ministers of foreign affairs, and diplomatic personnel.[184] Under its terms, states must enact legislation to criminalize any attack or threat on protected persons or on

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correspondents, supply contractors [etc.] . . . [who] have received authorization from the armed forces which they accompany" are treated as POWs if captured. The paragraph goes on to require that these persons be issued Geneva ID cards. *See also* Stephen R. Sarnoski, *The Status Under International Law of Civilian Persons Serving with or Accompanying Armed Forces in the Field,* ARMY LAW., Dec. 1994, at 29; Memorandum, Office of The Judge Advocate General, DAJA-KL, to Deputy Chief of Staff for Logistics, subject: Contractor Personnel in Contingency Operations, para. 1b (25 Mar. 1992).

[182] DEP'T OF DEFENSE DIRECTIVE 1404.10, EMERGENCY-ESSENTIAL (E-E) DOD U.S. CITIZEN CIVILIAN EMPLOYEES, para. **D3** (Apr. 10, 1992) [hereinafter DOD Dir. 1404.101.

[183] *See, e.g.*, Geneva POW Convention, *supra* note **9,** art. 129. *See also* LEVIE, *supra* note 179. When the International Committee of the Red Cross inquired about the United States ability to prosecute violators, the American Red Cross answered that "in the unlikely event that a person might not be punishable . . . because of a lack of jurisdiction . . . it is the US. Government's opinion that such person could be turned over to another [nation]."Id. at 237.

[184] Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *opened for signature* Dec. 14, 1973, 28 U.S.T. 1975, art. 1. (entered into force 1977; ratified by the United States 1976).

their "official premises," "private accommodation," or "means of transport."[185]

States must not only provide for jurisdiction over these offenses when they are committed on the state's territory, but they must also provide for jurisdiction "when the alleged offender is a national of that State."[186] In several other provisions, the agreement requires states to either prosecute the offenders "without exception whatsoever and without undue delay" or extradite them to another state for prosecution.[187]

In accordance with the agreement, Congress criminalized attacks on internationally protected persons. Uncharacteristically, Congress provided for jurisdiction over any person "present within the United States, irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender."[188] Thus, we see that Congress appreciates its ability to exercise extraterritorial jurisdiction in accordance with its treaty obligations.

b. Protection of *UN* Peacekeepers—In December 1994, the UN adopted the Convention on the Safety of United Nations and Associated Personnel, and opened it for signature.[189] The Convention addresses many of the peacekeeping issues that fall outside of the customary law of war and the Geneva Conventions. For example, it addresses the status of captured UN peacekeeping personnel[190] and crimes committed against those personnel.[191] The Convention requires every signatory state to criminalize certain offenses against UN peacekeepers, such as murder, assault, and kidnapping.[192] States must also establish jurisdiction over their nationals who commit any of the listed offenses.[193] Any state that fails to establish or exercise its jurisdiction must extradite the alleged offender to a state that has jurisdiction to try the offender.[194]

The United States signed the Peacekeepers Convention in

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[185]*Id.* art. 2.

[186]*Id.* art. 3.

[187]*Id.* art. 7. ***See*** *also id.* art. 6.

[188]18 U.S.C.S. § 1116 (Law. Co-op. 1994).

[189]UN Protection of Peacekeepers Convention, *supra* note 9.

[190]*Id.* art. 8.

[191]*Id.* art. 9.

[192]*Id.*

[193]*Id.* art. 10, para. 4.

[194]*Id.* ***See*** *also id.* art. 15 *("To* the extent that the crimes set out in article 9 are not extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein.").

December 1994.[195] However, the President will not present it to the Senate for ratification until the executive branch completes its article-by-article analysis and drafts implementing legislation.[196]

c. International Tribunal for Yugoslavia—In 1993, the UN formed an international tribunal "for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia."[197] The tribunal has the power to prosecute persons for grave breaches of the Geneva Conventions,[198] for violations of the customary laws of war, and for genocide and crimes against humanity.[199] Collectively, these powers reach a full range of crimes, to include murder, rape, aggravated assault, destruction of property, and plunder of public or private property.[200]

The Statute of the International Tribunal provides for concurrent national and international jurisdiction and for the application of double jeopardy principles.[201] However, the statute explicitly provides for the tribunal to have "primacy over national courts."[202] The procedural rules instruct the prosecutor to request jurisdiction from a national court if it appears that the national proceedings are not impartial, if the investigation or proceedings are "designed to shield the accused from international criminal responsibility,'' or if a nation is not "diligently" prosecuting the case.[203]

Obviously, if a nation cannot try an offender because that nation lacks jurisdiction, the tribunal will request that the offender be surrendered to its jurisdiction. The tribunal has no mechanism to force the surrender; however, Rule 11 instructs the tribunal to report any denial to the UN Security Council.[204]

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[195]*See* U.S. Dep't of State, *Dep't of State Dispatch, Treaty Actions,* vol. *6*, no. 7, (Feb. 13, 1995), *available in* LEXIS, Nexis Library, Current News File (indicating that the United States signed the Convention on Dec. 19, 1994).

[196]Telephone Interview with Lieutenant Colonel Steven J. Lepper, Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff (Mar. 22, 1995).

[197]Int'l Tribunal for Yugoslavia, *supra* note 11.

[198]For a discussion of grave breaches, see *supra* note 173.

[199]Int'l Tribunal for Yugoslavia, *supra* note 11, *reprinted in* 32 I.L.M. 1159, 1192-1194 [all subsequent cites to I.L.M. pagination].

[200]*Id.*

[201]*Id.* arts. 9 & 10, at 1994-95.

[202]*Id.* art. 9, at 1194. The tribunal is authorized to request primary jurisdiction (art. 9), and states must transfer an accused to the tribunal upon its request (art. 29).

[203]*International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991: Rules of Procedure and Evidence,* Rule 9, *U.N.* Doc. IT/32 (1994), *reprinted in* 33 I.L.M. 484 (1994). The rules were adopted February 11, 1994, and entered into force on March 14, 1994.

[204]*Id.* rule 11.

There is no way to predict how Congress, the President, or the American public would react to the possibility of turning a United States citizen over to an international tribunal. The response would probably depend on the facts of the offense. If the offense is a heinous crime without any apparent justification, perhaps there will be little concern. If the facts are more controversial, the response could be quite different. For example, a murder charge could turn on a disputed claim of self-defense, on an interpretation of the rules of engagement, or on a claim of superior orders.

In either case, the specter of the United States being "forced" to surrender a portion of its sovereign rights to an international tribunal will not sit well on the American psyche. When the cause of that surrender is a simple failure to pass appropriate legislation, the prospect is even more unsettling.

d. Future International Tribunals—International tribunals will continue to play a significant and ever increasing role in international relations. For example, at the same time the UN formed the International Tribunal for the former Yugoslavia, it was forming at least two other tribunals: the International Tribunal for Rwanda; and a standing International Criminal Tribunal.

The UN Security Council established the International Tribunal for Rwanda in November 1994.[205] While the Rwanda tribunal is very similar to the tribunal for the former Yugoslavia, it has the additional mandate to prosecute any "serious violations" of common Article 3 of the Geneva Conventions.[206] The Rwandan tribunal has approximately the same jurisdictional provisions as the tribunal for Yugoslavia.[207] The intent of the Rwandan tribunal statute is clear: no person should escape punishment for criminal acts. With the Rwanda tribunal, we see the added dimension of enforcement of common Article 3 of the Geneva Conventions—a confirmation of the trend for ever increasing criminal responsibility, even in noninternational conflicts.

The UN is also working on an international, standing tribunal. The prospect of forming a standing international criminal tribunal has been an issue since 1945; however, the process was stalled by

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[205] S.C. Res 955, SCOR, 3453d mtg., U.N. Doc. S/Res/955 (1994); *reprinted in United Nations: Security Council Resolution 955 (1994) Establishing the International Tribunal for Rwanda*, 33 I.L.M. 1598, 1600 (1994) [hereinafter Int'l Tribunal for Rwanda]. The statute governing the tribunal is annexed to the Security Council Resolution.

[206] *Id.* art. 4. The provisions of Article 3 are common to all four Geneva Conventions of 1949; they set basic humanitarian standards. Common article 3 applies "[i]n the case of armed conflict not of an international character." ***See,*** *e.g.*, Geneva Civilians Convention, *supra* note 9, art. **3.**

[207] *See* Int'l Tribunal for Rwanda, *supra* note 205, arts. 5-9.

Cold War politics.[208] Now that the Cold War has ended, the UN is again pushing for a standing international tribunal.

Along with the draft statute for the International Criminal Tribunal, the UN International Law Commission drafted a Code of Crimes Against the Peace and Security of Mankind.[209] Under the draft code, if an alleged perpetrator is found in a state, that state "shall either try or extradite him."[210] For extradition, a state "shall give special consideration" to the state where the crime was committed.[211]

There are those, no doubt, who think the United States should subject its citizens to these international tribunals if the United States expects other nations to do so. This article does not take a stand on the political wisdom of that argument. However, the United States should be in a position to make that decision based on the facts of the case.

Unless Congress passes legislation to give the United States jurisdiction over its citizens, the United States has only two options: turn those citizens over to an international tribunal, or let them escape punishment altogether.[212] With these options, world opinion could effectively force the United States into accepting the tribunal's jurisdiction, regardless of the circumstances of the alleged offense.

B. Who *are the Civilians Accompanying the* ***Force?***

There are at least three types of civilians accompanying the armed forces: **(1)** family members; **(2)** civilians hired directly by the military; and **(3)** civilians who are providing services pursuant to a contract with the military.[213]

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[208] James Crawford, The *ILC's* Draft Statute for an International Criminal *Tribunal*, 88 *AM.* J. INT'L. L. 140, 141 (1994).

[209] *Report* of the International Law Commission, 43d Sess., 29 April-19 July 1991, 46th Sess., Supp. (No. 10), U.N. Doc. A/46/10, reprinted in COMMENTARIES ON THE INTERNATIONAL LAW COMMISSION'S 1991 DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (M. Cherif Bassiouni ed., 1993).

[210] *Id.* art. 6.

[211] *Id.*

[212] The Geneva Conventions, supra note 9, also allow the United States to turn those individuals over to a third country for prosecution of violations of the Conventions. See, *e.g.*, Geneva Civilians Convention, supra note 9, art. 146. The remaining three Conventions have similar provisions.

[213] There are other nongovernmental civilians, such as reporters and relief and aid society personnel, who follow, or even precede, military deployments. However, a discussion of their role and place during modern deployments is beyond the scope of this article. For a discussion regarding the military's ability to control reporters during deployments, see Nation Magazine **v.** Department of Defense, **762** F. Supp. 1558 (S.D.N.Y. 1991) (court discusses, without deciding, military's ability to limit press access to the battlefield).

1. Family Members — During peacetime, family members accompany the armed forces in numerous countries throughout the world, to include Germany, Italy, Turkey, England, Korea, Japan, and Panama. However, as the United States reduces the number of troops stationed overseas, the number of family members decreases accordingly.[214]

The Reid cases closed the door to court-martial jurisdiction over family members during peacetime.[215] The United States could extend federal court jurisdiction over family members overseas; however, despite repeated attempts, Congress has not passed appropriate legislation.[216]

2. Employees and Contractors — The Army has two types of civilian employees accompanying the force: (1) Department of the Army Civilians (DACs), whom the Army hires directly; and (2) contractor personnel, who work for companies that have contracted with the government to provide services. These civilians are at virtually every military post overseas, where they perform a variety of tasks from maintaining highly technical weapons systems to writing software.

During Operation Desert Shield, the military deployed 800 contractor personnel and 450 DACs to the Persian Gulf.[217] During Desert Storm, these numbers increased to 950 contractor personnel and 750 DACs.[218] Thirty-four contractor personnel even crossed the Iraqi border during the ground offensive.[219] Contractors maintained highly technical weapons systems such as Apache helicopters, Bradley Fighting Vehicles, Abrams tanks, laser target designators, multiple launch rocket systems, and Patriot missiles.[220]

Department of the Army Civilians also repaired military equipment, weapons, and communications systems. In addition, they performed vital logistics missions. Army civilians "sped up the process of getting parts and other support from 60 logistics agencies at Army installations worldwide."[221]

When the military again deployed troops to the Persian Gulf in

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[214]From 1989 to 1996, the Army will decrease its troops in Europe from 213,000 to 65,000 personnel. PROJECTING POWER, *supra* note 5, at 7.

[215]*See* Reid v. Covert, 354 U.S. 1 (1957); Kinsella v. Singleton, 361 U.S. 234 (1960).

[216]*See* bills cited *supra* note **2.**

[217]Contractor Support, *supra* note 153.

[218]*Id.*

[219]*Id.*

[220]*Id.*

[221]Garcia, *supra* note 7, at 10.

the fall of 1994 for Operation Vigilant Warrior, at least 160 DACs deployed with the troops.[222] During that same time, nearly 100 DACs deployed to Haiti with the United States military.[223]

In McElroy and Grisham, the Supreme Court decided that for jurisdictional purposes, civilian employees were the same as family members; during peacetime they could not be tried by court-martial.[224] Then, in 1970, the military court held that UCMJ Article 2 "time of war" jurisdiction only applies if Congress declares war.[225] As with family members, Congress could vest federal courts with jurisdiction over these civilians. Congress and the President could also exercise their constitutional war powers to bring civilians deployed on military operations under court-martial jurisdiction.

C. Changes in American Military Doctrine

The past five years have brought great changes to the American military. The force is smaller. It tends to be stationed in the United States, and then deployed where it is needed. Deployments have increased in both number and variety. In short, numbers, force structure, and mission requirements have all changed. However, the extraterritorial jurisdiction debate is much the same: it focuses on traditional armed conflicts or large overseas military bases.

1. A Smaller, United States Based Military — In 1989, the Army had 770,000 active duty soldiers and 403,000 civilian employees.[226] By 1995, those numbers were down to 510,000 and 270,000, respectively.[227] The Army expects to reach its final downsizing in 1996, with 495,000 soldiers.[228] The civilian force is expected to reach its final downsizing in 2001, to the level of 233,000 personnel.[229]

Much of this force reduction occurred in Europe. From a Cold

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[222] Telephone Interview with Major Daniel M. Wiley, Office of the Deputy Chief of Staff for Personnel, Headquarters, Army Materiel Command (Mar. 13, 1995).

[223] *Id.*

[224] McElroy v. Gualiardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960).

[225] United States v. Averette, 41 C.M.R. 363 (C.M.A. 1970) (interpreting UCMJ art. 2(a)(10), which states that "[i]n time of war, persons serving with or accompanying an armed force in the field" are subject to court-martial).

[226] PROJECTING POWER, *supra* note 5, at 7.

[227] *Id.*

[228] *Id.*

[229] *Id.*

War high of 858 installations[230] and 216,000 soldiers[231] in Europe, the Army is moving toward a total of 277 installations[232] and 65,000 soldiers[233] in Europe by 1999.[234] In the Army's terminology, the Army is moving from a large, "forward deployed" Army with almost thirty-two percent of the force in Europe, to a smaller, "power projection" Army with over seventy-five percent of the force in the United States.[235] These changes in force size and force location create corresponding changes in the military's need for jurisdiction over civilians accompanying those forces.

2. Force Projection—Force projection doctrine is the new cornerstone of the military's post-Cold War strategy. This section describes force projection doctrine and the subcategory of force projection logistics—an area manned largely by civilians.

a. Force Projection Doctrine—Under the United States Cold War strategy, the military permanently stationed large numbers of military forces overseas,[236] primarily in Europe. As part of that permanent stationing arrangement, American military and civilian personnel are covered by detailed status of forces agreements (SOFAs).[237]

The Army's new doctrine calls for a much smaller overseas presence. Under force projection doctrine, the Army's goal is to move a light brigade from the United States to any country in the world in four days and a light division in twelve days.[238] A light division would put approximately 10,500 soldiers and support personnel in a foreign country in less than two weeks.

These rapid deployments into foreign nations for operations other than war create new twists in the legal status of those forces while they are in a foreign country. Quite simply, SOFAS and military law have not kept pace with current military operations. Without a traditional military operation and without the time to

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[230] *Id.*

[231] DEPARTMENT OF THE ARMY, ARMY FOCUS 1994—FORCE XXI 9 (1994) [hereinafter *ARMY* FOCUS 1994].

[232] PROJECTING POWER, *supra* note 5, at 8.

[233] ARMY Focus 1994, *supra* note 231, at 10.

[234] PROJECTING POWER, *supra* note 5, at 8.

[235] *Id.* at 7.

[236] ARMY Focus 1994, *supra* note 231, at 9.

[237] NATO SOFA, *supra* note 16. Similar agreements are in effect in Korea and Japan, *see infra* note 274.

[238] ARMY FOCUS 1994, *supra* note 231, at 10.

negotiate a SOFA, operational lawyers are literally making it up as they go along.[239]

b. Force Projection Logistics—The modern American army consumes a tremendous amount of supplies and services. For example, during the 100-hour ground offensive in Operation Desert Storm, "a single division consumed 2.4 million gallons of fuel transported on 475 5,000-gallon tankers."[240] Clearly, logistics are key to successful force projection. The Army's new Logistic Support Elements (LSEs) were formed to meet this growing logistical need in operations throughout the world.

The concept of LSEs goes far beyond just supplying fuel. Logistic Support Elements provide aviation and vehicle repair, missile maintenance, test measurement, and diagnostic equipment. They maintain software systems, provide assistance in science and technology, and provide contracting support.[241]

In early 1994, the Army leadership approved the LSE concept plan.[242] The LSE proposal listed only one major disadvantage: the "ramifications of deploying civilians to a combat area."[243] Under the approved LSE concept, the Army identified 1276 personnel to deploy with the LSE as needed.[244] The majority of those personnel are civilians.[245]

Under Department of Defense guidance, the Army must code civilian personnel in "deployable" positions as "emergency essential."[246] As the terminology implies, emergency essential civilians

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[239]*See, e.g.*, Brian H. Brady, *The Agreement Relating to a United States Military Training Mission in Saudi Arabia: Extrapolated to Deployed Forces?*, ARMY LAW., Jan. 1995, at 14. *See also* numerous Judge Advocate After Action Reports on file with the Center for Law and Military Operations, The Judge Advocate General's School, Charlottesville, Virginia [hereinafter CLAMO].

[240]FM 100-5, *supra* note 5, at 12-2.

[241]Memorandum, Office of the Deputy Chief of Staff for Operations and Plans, DAMO-FDF, to Commander, United States Army Materiel Command, subject: Logistics Support Element (LSE) (2 Feb. 1994). This memorandum approved the LSE concept plan and ordered its implementation.

[242]*Id.*

[243]*Id.*

[244]Jon M. Schandelmeier, *The Logistics Support Element*, ARMY LOGISTICIAN, July-Aug. 1994, at 19; Message, Army Material Command, Operations Support Directorate (1015002 Feb 94), subject: Logistics Support Element (LSE) [hereinafter LSE message].

[245]*Id. See also* AMC CIVILIAN DEPLOYMENT GUIDE, *supra* note 181, at 7 ('When fully deployed, the LSE will have limited depot capability consisting of approximately 1300 personnel, the majority being civilians.").

[246]LSE Message, *supra* note 244.

are those civilians who are critical to the military mission.[247] The military must train emergency essential civilians in the law of war and the UCMJ.[248] Before emergency essential civilians deploy with the force, the military must issue them appropriate equipment[249] and a Geneva Convention identification card.[250] When they deploy, they receive danger pay.[251] The theater commander can also decide whether to give them sidearms and weapons training for their personal defense.[252]

Understandably, commanders are reluctant to arm civilians. This reluctance is caused in part by their lack of jurisdiction over these civilians.[253] The Army's civilian deployment handbook states that civilians are not subject to the UCMJ except in a declared war.[254] Rather, they are subject to the "normal administrative disciplinary procedures," such as suspension or dismissal.[255] In other words, if a deployed civilian murders someone with a weapon issued by the United States Army, the only thing the commander can do is suspend him from work and start removal proceedings.[256]

The military could also turn that civilian over to the host nation for prosecution. However, in many recent deployments, that would not be a viable option. In an armed conflict such as Operation Desert Storm, when civilians crossed the border into Iraq, Iraq became the "host nation." Obviously, the United States will not turn

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[247] DOD DIR. 1404.10, *supra* note 182, para. D1 (civilians deployed only if they are "specifically required to ensure the success of combat operations or the availability of combat-essential systems").

[248] *Id.* para. 9h.

[249] *Id.* The Directive states that civilians should be given "protective equipment." Other references indicate that civilians will be issued chemical defensive equipment (chemical protective masks and protective clothing), and that they may also be issued military uniforms, canteens, ponchos, and other items of military individual equipment. AMC CIVILIAN DEPLOYMENT GUIDE, *supra* note 181, at 27 and app. A.

[250] DOD DIR. 1404.10, *supra* note 182, para. 9c.

[251] *Id.* para. 9b.

[252] *Id.* para. 9h.

[253] Telephone interview with Colonel John D. Altenburg Jr., Staff Judge Advocate, XVIII Airborne Corps and Fort Bragg (Mar. 23, 1995). According to Colonel Altenburg, commanders are also concerned about their ability to verify that civilians are appropriately trained on the weapons and on the rules of engagement.

[254] AMC CIVILIAN DEPLOYMENT GUIDE, *supra* note 181, at 37. As discussed *supra* note 169-71 and accompanying text, UCMJ art. 18 (1988) grants court-martial jurisdiction over "any person who by the law of war is subject to trial by a military tribunal." Consequently, the AMC CIVILIAN DEPLOYMENT GUIDE may not be entirely accurate—the military may be able to court-martial a civilian in some circumstance short of a declared war.

[255] *Id.*

[256] *See generally* 5 U.S.C.S. §§ 7511-7514 (Law. Co-op. 1994); 5 C.F.R. § 752.401 et. seq. (1995) (outlining civilian employee removal procedures).

a United States citizen over to the enemy for trial.[257] Even in situations where there is no "enemy," such as in Haiti and Rwanda, the host nation may not have a functioning court system to conduct a trial.

During Operations Desert Shield and Desert Storm, almost 1600 civilians were deployed to Saudi Arabia.[258] While Saudi Arabia is a friendly host nation with a functioning court system, it operates under Islamic law. Many of the punishments under Islamic law, such as severing of hands and stoning to death, are abhorrent to most Americans. Under Islamic law, if a person is found guilty of murder, the victim's family can demand the murderer's execution.[259]

One need only look back to the recent case of the American youth who was caned in Singapore to understand the reaction of the American public to these types of punishment.[260] A murder or theft trial in an Islamic country during a military deployment could have two added dimensions that the Singapore case was missing: (1) the punishment could be much more cruel and severe; and (2) the punishment would be meted out on a citizen whom the United States sent on an official mission, rather than on a citizen who chose to go to the country for his own purposes.

3. Operations Other Than War — Operations other than war create new problems for military lawyers. The Geneva Conventions contain the main body of the law of war. Unfortunately, the Conventions were written in 1949 to regulate the conduct of traditional international armed conflicts.[261]

Current joint military doctrine lists seven "military operations other than war not involving the use or threat of force": humanitarian assistance; nation assistance; support to counter drug operations; arms control; support to civil authorities; evacuation of noncombatants; and peacekeeping.[262] By definition, these are not com-

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[257] There is the possibility of using a military tribunal or a court-martial under UCMJ art. 18 (1988) to try cases that occur during international armed conflict. *See supra* notes 169-71 and accompanying text.

[258] Garcia, *supra* note 7, at 10.

[259] Steven J. Lepper, *A Primer on Foreign Criminal Jurisdiction*, 1994 A.F.L. Rev. 169, 181.

[260] *See, e.g.*, *Crime and Punishment: Should America be More Like Singapore?*, NEWSWEEK, Apr. 18, 1994, at 18.

[261] Geneva Conventions, *supra* note 9. Under Article 2, the Conventions apply "to all cases of declared war or of any other armed conflict which may arise between two or more" States, and to "all cases of partial or total occupation of the territory" of another State. Under Article 3, basic humanitarian rights are protected during noninternational armed conflict, like civil war. Articles 2 and 3 are identical in all four Conventions.

[262] Joint Chiefs of Staff, Publication 3-07, Joint Doctrine for Military Operations Other than War (1994) [hereinafter Joint Pub. 3-07]. "[T]hese operations by definition do not involve combat . . ." *Id.* at 1-10

bat operations.[263] Add to these at least six operations other than war that do involve "the use or threat of force": deterrence missions; peace enforcement; counter-terrorism; enforcement of sanctions; support to insurgencies and counterinsurgencies; and evacuation of noncombatants.[264]

An operation other than war can take the form of any of the thirteen operations listed above; it can be a combination of two or more of those operations; or it can be an operation other than war in conjunction with a traditional armed conflict.[265] Thus, a single military "operation" can contain a peace enforcement operation along with a humanitarian assistance operation.[266] For the peace enforcement operation, the Geneva Conventions and the law of war will apply. For the humanitarian assistance operation, the law of war will not apply, and at best, only common article **3** of the Geneva Conventions will apply.[267]

Aside from the issue of when the military is under the "law of war," these composite operations create a multitude of other legal problems, such as the status of the force, rules of engagement, security assistance, and fiscal law distinctions. The operation should not be further complicated by issues of personal jurisdiction over civilians accompanying the force.

If the military has jurisdiction only over civilians accompanying the force during "armed conflict,"[268] jurisdictional distinctions will be based on subtle differences in mission description. For civilians performing combat service support in a theater of mixed operations, the military may not be able to distinguish which mission those civilians are supporting at any given time.

D. Constraints on the United States Ability to Negotiate New Status of Forces Agreements

Force projection and operations other than war affect the types of SOFAs that the military can negotiate. Accordingly, this section focuses on how the lack of jurisdiction over civilians constrains the United States ability to negotiate new SOFAs, and on how it con-

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[263] *Id.* at 1-10.

[264] *Id.* at I-9

[265] *Id.* at 1-11. ***See*** *also* FM 100-23, *supra* note 163, listing other operations, such as preventive diplomacy (deployment to deter violence), observation missions to monitor truces and cease-fires, and supervision of protected zones.

[266] Joint Pub 3-07, *supra* note 262, at 1-11.

[267] *See* Geneva Conventions, *supra* note 9, art. 3 (listing basic humanitarian principles that apply during non-international armed conflicts).

[268] *See* discussion of proposed change to UCMJ art. 2, *supra* notes 149-52 and accompanying text.

strains the United States ability to maneuver within the bounds of an agreement once it is negotiated.

1. Foreign Criminal Jurisdiction *and* Status *of* Forces Agreements—In 1812, in the case of the Schooner Exchange, Chief Justice Marshall laid out a succinct expression of the general rule of sovereign jurisdiction: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."[269]

Over the years, several theories of military jurisdiction have evolved to deal with this general rule that a foreign nation has the right to exercise exclusive jurisdiction within its own borders. Some of these theories are based on reality—when a hostile force enters and captures territory in a nation, that nation is no longer in a position to exercise jurisdiction over that captured territory.[270] Other theories recognize the general rule and deal with its effects through negotiated international agreements.

When United States forces enter a foreign country during an armed conflict, the law of war allows the United States to apply the "law of the flag." That is, the United States force applies its own law to its own personnel.[271] If the United States force stays in a country, it becomes an occupying force, and again, the force applies its own laws to its forces and possibly to the territory it occupies.[272] However, if a United States force enters a friendly foreign nation with that nation's consent, the United States force is subject to foreign jurisdiction unless the United States negotiates an agreement with the host nation.[273] These agreements normally take the form of SOFAS.

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[269] Schooner Exchange v. M'Fadden, 11 U.S. (7 Cranch) 116, 136 (1812).

[270] *See* Coleman v. Tennessee, 97 U.S. 509 (1878). "The fact that war is waged between two countries negatives the possibility of jurisdiction being exercised by the tribunals of the one country over persons engaged in the military service of the other . . . . Aside from this want of jurisdiction, there would be something incongruous and absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country he had invaded." *Id.* at 516.

[271] *Id. See also* Lepper, *supra* note 259, at 170-71.

[272] According to the 1907 Hague Convention, *supra* note 31, art. 42, "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army." The Geneva Civilians Convention, *supra* note 9, art. 64, requires the occupying power to keep the laws of the occupied territory in effect if they do not jeopardize the security of the occupying force. *See also* FM 27-10, *supra* note 165, para. 374. Personnel of the occupying force are not subject to the laws of the occupied territory unless the force consents to the jurisdiction.

[273] *See* MCM, *supra* note 26, R.C.M. 201(d) discussion. It is interesting to note that in the *Schooner Exchange* case, the Court held that under customary international law in 1812, if a friendly force entered the territory of a friendly country, those forces are entitled to a form of sovereign immunity, or "free passage," that "implies a waiver of all jurisdiction over the troops during their passage." *Schooner Exchange*, 11 U.S. at 139- 40. However, by 1957 the Supreme Court was citing the *Schooner Exchange* to uphold Japan's jurisdiction over a United States soldier, under the theory that a sovereign nation has exclusive jurisdiction within its borders unless it waives that jurisdiction. Wilson v. Girard, 354 U.S. at 529. *See also* Lepper, *supra* note 259, at 170-71.

Status of forces agreements are bilateral or multilateral international agreements regarding the legal status of the forces while they are in a foreign country. These agreements apply to the military and to civilian members of the force, and may also apply to family members accompanying the force.[274]

Whenever possible, the United States negotiates SOFAs with friendly host nations. The United States has detailed, mature agreements in effect for forces stationed in all NATO countries, in Korea, and in Japan.[275] For political or practical reasons, however, the United States cannot always negotiate a comprehensive agreement. For example, United States troops have been in Saudi Arabia since the 1930s, yet the United States still does not have a formal SOFA with the Kingdom of Saudi Arabia.[276] Consequently, the United States resolves status of forces issues in Saudi Arabia by stretching existing small mission agreements and by resorting to custom and negotiation.[277]

2. New *SOFAs and* New Issues — United States troops increasingly work under United Nations SOFAs[278] or under vague agreements like those in Saudi Arabia.[279] Force projection and operations other than war may also hinder the military's ability to negotiate new agreements.

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[274]Along with jurisdiction, SOFAs often regulate other matters. Some of the more common provisions provide for duty-free import and export of personal belongings, supplies, and military equipment; waivers of passport and visa requirements; immunity from taxation and tolls; registration and licensing of vehicles and drivers; and procedures for settling damage claims. *See generally* NATO SOFA, *supra* note 16; Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan with Agreed Minutes, Jan. 19, 1960, 2 U.S.T. 1652, *reprinted in* DA PAM. 27-24, *supra* note 16, at 2-93: Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, July 9, 1966, 2 U.S.T. 1677, *reprinted in* DA PAM. 27-24, *supra* note 16, at 2-109 [hereinafter Korean SOFA]; *Comprehensive Reuiew of the Whole Question of Peace-keeping Operations in all Their Aspects — Model status-of-forces agreement for peace-keeping operations*, U.N. GAOR, 45th Sess., Agenda item 76, U.N. Doc. A/45/594 (1990) [hereinafter UN Model SOFA].

[275]*See* SOFAs cited *supra* note 274.

[276]Brady, *supra* note 239, at 14.

[277]*Id.* and authorities cited therein.

[278]*See* UN Model SOFA, *supra* note 274. Note, however, that the model SOFA itself has no legally binding effect. It is exactly what its name implies: a model. Most UN SOFAS follow the model very closely, however. *See, e.g.*, Agreement Between the Government of Bosnia and Herzegovina and the United Nations on the Status of the United Nations Protection Force in Bosnia and Herzegovina (May 15, 1993); Agreement Between the United Nations and the Government of Haiti on the Status of the United Nations Mission in Haiti (Feb. 1995, unsigned draft) (both SOFAs on file with the CLAMO).

[279]*See generally* Brady, *supra* note 239.

In many cases, the military simply does not have an opportunity to negotiate an agreement before forces are on the ground.[280] In some instances, like in Haiti, the United States enters **a** nation in transition or turmoil and must choose with whom it will negotiate.[281] In other countries, like Somalia, there may not be a government that is capable of concluding an agreement.[282] Under a mature SOFA, the rules are detailed and settled.[283] With a vague SOFA or with no SOFA at all, the military needs room for case-by-case negotiation during the operation or deployment.

Many recent SOFAs are patterned on the UN Model SOFA,[284] which is much shorter and less detailed than the NATO SOFA. The UN Model SOFA also relies heavily on the Convention on the Privileges and Immunities of the United Nations.[285] Essentially, the Convention grants diplomatic immunity to UN delegates, deputy delegates, advisers, technical experts, and secretaries of delegations,[286] and to "experts . . . performing missions for the United Nations."[287]

The UN Model SOFA gives many members of the United Nations peacekeeping operation this "diplomatic immunity."[288]

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[280]The SOFA for the multinational force in Haiti was not signed until December 1994. Forces were on the ground in Haiti in mid-September. *Compare Mission to Haiti: An Perspective; The G.I.s Are in Haiti: Now for the Hard Part*, N.Y. TIMES, Sept. 20, 1994, at A12 *with* Agreement Between the Governments Participating in the Multinational Force ("MNF") Authorized Pursuant to Security Council Resolution 940 and the Republic of Haiti on the Status of MNF Forces in Haiti (Dec. 8, 1994) [hereinafter Haiti MNF SOFA] (on file with the CLAMO).

[281]The choice of a negotiating partner is often a function of America's reason for entering the country. For instance, in Haiti the United States chose to negotiate with President Aristide because it was the United States position that President Aristide represented the government of Haiti and the coalition forces were entering Haiti to restore the legitimate government.

[282]In countries like Haiti and Somalia, the realities of the situation on the ground may make some status of forces concerns irrelevant; it is hard to be concerned about who will have jurisdiction when the host nation does not have a functioning police force or court system.

[283]For example, under the NATO SOFA there are three types ofjurisdiction: (1) exclusive host nation jurisdiction over acts that are punishable only by the laws of the host nation; (2) exclusive sending state jurisdiction over offenses that are punishable only by the laws of the sending state; and (3) concurrent jurisdiction for all offenses that are punishable by the laws of both states. The NATO SOFA then lays out detailed rules for determining which nation has the primary right to exercise jurisdiction over the concurrent offenses. NATO SOFA, *supra* note 16, at art VII. The Japanese and Korean SOFAs have similar provisions.

[284]*See, e.g.,* Haiti MNF SOFA, *supra* note 280.

[285]Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, **21** U.S.T. 1418, 1 U.N.T.S. 15 and 90 U.N.T.S. 327 (corrigendum to vol. 1) (ratified by the United States in 1970) [hereinafter Convention on Privileges and Immunities].

[286]*Id.* § 16.

[287]*Id.* § 22.

[288]UN Model SOFA, *supra* note 274, para. 4.

However, personnel who are "assigned to the military component of the United Nations peace-keeping operation" are not covered by the Convention on Privileges and Immunities.[289] Therefore, when the United States sends military and civilian personnel on UN peace-keeping missions, they are covered only by the terms of the UN SOFA.

The criminal jurisdiction provisions of the Model SOFA are strikingly simple when compared to the scheme laid out in the NATO SOFA. Military personnel "are subject to the exclusive jurisdiction" of their state.[290] If a civilian is accused of a crime, the UN Special Representative or UN Commander "shall conduct any necessary . . . inquiry and then agree with the Government whether or not criminal proceedings should be instituted."[291] If they cannot reach an agreement, the issue is "submitted to a tribunal of three arbitrators."[292]

The simplicity of the Model SOFA's jurisdictional scheme certainly seems appealing. For military personnel, it is the best the military could ask for. However, because the United States does not have jurisdiction over its civilians, the UN SOFA leaves the United States only two choices: either (1) turn the civilian over to the host nation for prosecution or **(2)** let the offender go unpunished. If the United States cannot reach an agreement with the host nation and finds itself in arbitration over jurisdiction, it is in the weakest possible bargaining position. The United States can only offer administrative sanctions against the civilian.

A case from Saudi Arabia serves to illustrate the weakness of America's bargaining position. In 1991, Mr. Sands, a civilian employed by the United States Army, was suspected of murdering his wife on a military installation in Saudi Arabia.[293] The agreements in effect in Saudi Arabia gave primary jurisdiction over United States civilians to the Kingdom of Saudi Arabia.[294] However, the United States negotiated with Saudi Arabia for jurisdiction because of concerns over whether Sands would receive a fair trial (and concerns over the possible punishments) under Islamic law.[295]

Normally, the United States would have no jurisdiction over

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[289] Convention on Privileges and Immunities, *supra* note 285, § 27.

[290] *Id.* § 47(b).

[291] *Id.* § 47(a).

[292] *Id.* §§ 47(a), 53.

[293] Sands v. Colby, *35* M.J. 620 **(A.C.M.R.** 1992).

[294] *See* Lepper, *supra* note 259, at 181; Brady, *supra* note 239, at 18.

[295] *See* Lepper, *supra* note 259, at 181 and sources cited therein; *Sands, 35* M.J. at 620.

civilians such as Sands, and therefore the United States would have little negotiating power. With Sands, however, the circumstances were unique: Sands was retired from the Army and thereby subject to court-martial jurisdiction.296 Without some fortuitous circumstance that allows trial by court-martial, such as that in the *Sands* case, the United States could not promise to prosecute a civilian. The United States would then be, in effect, negotiating for immunity from prosecution.

A world power known for its human rights advances and founded on the principle of the rule of law cannot enter a foreign nation for all the right reasons and then demand immunity for its citizens for all the wrong reasons. If the United States does not pass appropriate legislation, a single civilian incident could give America's enemies a powerful propaganda weapon: the image of American bullies with a double standard is not the image the United States wants to project.

In summary, the United States is taking an increasing number of civilian personnel into operations other than war. These civilians are performing critical functions and cannot be replaced by military personnel. United States policy allows the military to arm these civilians. Some SOFAs call for case-by-case agreement or arbitration over jurisdiction if a civilian commits an offense. Yet, lack of legislation deprives the United States of the ability to exercise jurisdiction over the civilians it deploys.

IV. Analysis of Possible Solutions

Solutions to the jurisdictional problem can take many forms and fall into several classifications. Solutions can be classified by types of personal jurisdiction. For example, jurisdiction based on nationality would cover every United States citizen; jurisdiction over all civilians accompanying the force outside of United States territory would cover employees, family members, and contractors; and jurisdiction over civilians accompanying the forces during armed conflict or military operations would cover civilians deployed on military operations.

The solutions can also be classified by type of court. For instance, the United States can gain jurisdiction by expanding federal court jurisdiction, or by expanding court-martial jurisdiction.

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296 UCMJ art. 2(a)(4) (1988) provides jurisdiction over "[rletired members of a regular component of the armed forces who are entitled to pay." The Army court relied on United States v. Overton, 24 M.J. *309* (C.M.A.), *cert. denied,* 484 *U.S. 976* (1987), which upheld UCMJ art 2 (a)(2), to extend court-martial jurisdiction over a retired Marine who had transferred to the Marine *Corps* Reserves.

In addition, individual solutions and classifications can be mixed: a constitutional amendment to allow trial by court-martial; federal court jurisdiction based on nationality; or any multitude of possibilities. However, regardless of the chosen solution, it must meet the Supreme Court's concerns as laid out in the *Reid* cases.[297]

Put simply, the Supreme Court listed four problems in the civilian court-martial cases: (1) no Article III judges, (2) no grand jury indictment, (3) no trial by jury, and (4) no war powers exception for courts-martial during peacetime. A solution can be framed based on the war powers issue alone. Otherwise, the solution must address the first three constitutional issues.

This section addresses the possible solutions by constitutional type: solutions that meet the first three constitutional requirements versus a solution based on constitutional war powers.

A. *Federal Court Jurisdiction*

Federal court jurisdiction can reach every United States citizen and national, or Congress can limit that jurisdiction in almost any way it chooses.[298] As a result, Congress can fashion a complete or a partial solution to fill the jurisdictional gaps. In this area, Congress is limited only by its political will and by international law.

At one extreme, Congress can base federal court jurisdiction on nationality.[299] Congress has the power to legislate over American citizens residing abroad,[300] and the Supreme Court has held that a citizen can be required to return to the United States and testify

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[297] McElroy v. Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kinsella v. Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957).

[298] *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868) (deciding that under Article III, Congress can withdraw a particular class of cases from Supreme Court review). *See also* U.S. CONST, art. III. Except for those cases listed under the Supreme Court's jurisdiction in Article III, Congress has the power to form (or not form) "inferior Courts" and to regulate appellate jurisdiction. *See also* Hudson v. Goodwin, 10 U.S. (7 Cranch) 32, 33 (1812) (confirming that lower federal courts are created by Congress and "possess no jurisdiction but what is given them by the power that creates them").

[299] *See* 8 U.S.C.A. § 1101(22) (West 1970) (defining "national of the United States" as a "citizen of the United States, or a person who, though not a citizen of the United States, owes permanent allegiance to the United States").

[300] *See, e.g.*, Skiriotes v. Florida, 313 U.S. 69, 73 (1941) (stating that "[t]he United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed"); Cook v. Tait, 265 U.S. 47 (1924) (upholding Congress's power to subject a citizen residing abroad to United States income tax).

under subpoena.[301] Congress could subject United States citizens to criminal penalties for violations of all federal laws or for violations of only particular provisions,[302] regardless of where those violations occur.[303]

1. Advantages *of* Federal Court Jurisdiction — The greatest advantage to federal court jurisdiction is that it meets all of the Supreme Court's constitutional concerns. Other advantages vary with the scope of the jurisdiction: the more expansive the jurisdiction, the greater the advantage. Jurisdiction based on nationality would completely fill the jurisdictional void. Jurisdiction over all persons accompanying the armed forces would fill the particular void left by the Reid cases.

a. Jurisdiction Based *on* Nationality — Federal court jurisdiction based on nationality provides the most comprehensive solution to the jurisdictional problem. It could cover every United States national at all times: civilian employees, family members, contractor personnel, soldiers, reporters, relief society workers, and even United States tourists.[304] Jurisdiction could not be defeated by a soldier's discharge[305] or by the end of a civilian's employment relationship. Furthermore, it would meet every present or future international obligation to prosecute.[306]

Aside from its comprehensive nature, this solution also has the advantage of evidentiary certainty. The statute would not need a complicated triggering mechanism or a list of factors to determine whether jurisdiction had attached. The United States could prove jurisdiction merely by proving nationality.

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[301] Blackmer v. United States, 234 U.S. 421 (1932).

[302] For examples of statutes extending federal court criminal jurisdiction based on nationality or universality, see 18 U.S.C.S. § 1116 (Law. Co-op. 1994); 18 U.S.C.S § 2331 (Law. Co-op. 1994).

[303] *See, e.g.*, 18 U.S.C.S. § 1116 (Law. Co-op. 1994) (criminalizing offenses against internationally protected persons "irrespective of the place where the offense was committed or the nationality of the . . . alleged offender").

[304] *See supra* note 299 (definition of "national of the United States").

[305] *See* Toth v. Quarles, 350 U.S. 11 (1955) (holding that discharged soldiers cannot be court-martialed for crimes committed while on active duty; in dicta, the Court noted that Congress could provide for ex-servicemen to be tried in federal district court).

[306] Note, however, that the Geneva Conventions (and many other treaties) are not self-executing; that is, they cannot be enforced without proper legislation to criminalize the grave breaches. Handel v. Artukovic, 601 F. Supp. 1421 (C.D. Cal. 1985). Furthermore, as early as 1812, the Supreme Court held that there was no common law federal jurisdiction for criminal offenses. "The legislative authority of the Union must first make an act a crime, affii a punishment to it, and declare the Court that shall have jurisdiction of the offense." United States v. Hudson & Goodwin, 10 U.S. (7 Cranch) 32 (1812). See *also* U.S. CONST. art. I, § 9, cl. 3 (prohibition on ex post facto laws).

This jurisdictional certainty would be a great advantage during SOFA negotiations. It would make the initial SOFA easier to negotiate and draft. In addition, the United States would have an advantage in any later negotiation or arbitration over individual cases.

b. All Civilians Accompanying the Force Overseas — After striking down court-martial jurisdiction over civilians in the Reid cases,[307] the Court indicated that Congress could provide for federal courts in the United States to hear the civilian cases.[308] Since 1962, several Senators and Representatives have unsuccessfully introduced bills to extend federal court jurisdiction over civilians accompanying the forces.[309]

This option shares many of the advantages of jurisdiction based on nationality. It covers all classes of civilians accompanying the armed forces overseas, and the prosecution can easily prove the family, employment, or contractual relationship that supports jurisdiction. In addition, Congress can grant federal courts jurisdiction over any crimes committed by personnel while they are accompanying the armed forces. In this way, jurisdiction does not end when the person returns to the United States or severs connections with the military.[310] Federal court jurisdiction over civilians accompanying the force also meets most of the United States international obligations to prosecute.

Jurisdiction over all civilians accompanying the forces would fit within the existing framework of the NATO SOFA and similar agreements. Like jurisdiction based on nationality, it would put the United States in an excellent negotiating posture for future SOFAs. The United States could negotiate to take jurisdiction over a particular civilian under a UN SOFA or to take jurisdiction in situations like those in the Sands case in Saudi Arabia.[311]

2. Disadvantages *of* Federal Court Jurisdiction — With so many obvious advantages, federal court jurisdiction of one kind or another would seem to be the ideal solution. Unfortunately, expansion of federal court jurisdiction also poses several problems of its own. The

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[307] McElroy v. Gualiardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kinsella v. Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957).

[308] *Kinsell*, 361 U.S. at 245-46.

[309] *See* bills cited *supra* note 2.

[310] *See* Toth v. Quarles, 350 U.S. 11 (1955) (denying court-martial jurisdiction over discharged soldier accused of murder). It is "wholly within the constitutional power of Congress to . . . provide for federal district court trials of discharged soldiers accused of offenses committed while in the armed services." *Id.* at 21.

[311] Sands v. Colby. 35 M.J. 620 (A.C.M.R. 1992). *See supra* notes 293-96 and accompanying text.

most practical disadvantage is that despite repeated attempts, Congress has failed to pass even modest legislation to expand federal court jurisdiction to cure the problems caused by the ***Reid*** cases.[312]

Although jurisdiction based on nationality would provide the most comprehensive solution, it is unlikely that Congress's first step would be so revolutionary, given Congress's past reluctance to expand jurisdiction. Furthermore, such an enormous expansion of jurisdiction would require an equally enormous expansion of resources to effectively exercise that jurisdiction. If Congress does pass legislation, it is more likely that Congress would only expand federal court jurisdiction over civilians accompanying the forces.

Senator Inouye has introduced legislation to extend jurisdiction over civilians accompanying the forces at least four times in the past seven years.[313] His bill would extend federal court jurisdiction over "any person . . . serving as a member of the armed forces outside the United States, or . . . serving with, employed by, or accompanying the armed forces outside of the United States."[314] It would apply to the common felonies that are covered under the "special maritime and territorial jurisdiction of the United States."[315] Every other legislative proposal is similar to Senator Inouye's bill.[316] Each bill provides for federal court jurisdiction over a limited class of serious offenses—none has passed.

Legislation similar to Senator Inouye's bill would also fail to meet the needs of military good order and discipline. It would not cover offenses such as disobedience of orders,[317] and it would put military good order and discipline into the hands of civilian federal prosecuting attorneys who are hundreds, perhaps thousands, of miles away.

If Congress does pass legislation to expand federal court jurisdiction, the next issue would be how and where to try the cases. If Congress does not set up Article III courts outside of the United States (even assuming a sovereign nation would allow Article III

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[312] *See* bills cited *supra* note 2.

[313] S. 74, 104th Cong., 1st Sess. (1995); S. 129, 104th Cong., 1st Sess. (1993); S. 182, 102d Cong., 1st Sess. (1991); S. 147, 101st Cong., 1st Sess. (1989).

[314] S. 74, 104th Cong., 1st Sess. (1995).

[315] *Id.* **See** *also 18* U.S.C.S. § 7 (Law. Co-op. 1994) (defining special maritime and territorial jurisdiction crimes).

[316] *See* bills cited *supra* note 2.

[317] During the peacekeeping mission in Macedonia, an American civilian employee violated the commander's policy against consuming alcoholic beverages. The employee was sent home early and was given a letter of reprimand. **See** AAR: Task Force Able Sentry, *supra* note 7.

courts on its soil), the cases would have to be tried in the United States. That simple statement poses two barriers: (1) getting custody of the person; and (2) obtaining the necessary evidence.

a. Custody of the Person and Extradition — Traditionally, nations gain custody of persons within the territory of another sovereign by extradition exercised according to treaty.[318] The United States currently has 104 extradition treaties in effect.[319] If the United States requests the return of a fugitive under an extradition treaty, the foreign state determines whether the extradition treaty applies to the particular crime[320] and whether cause for arrest exists. If so, the fugitive may be turned over to the requesting nation.[321] There are, of course, many other issues relating to extradition.[322]

While extradition is the internationally and legally accepted method of obtaining custody of an alleged wrongdoer, it is not the only means of getting that person into a United States court. Recent cases have established that if the United States obtains custody of a person by acting outside the scope of an established extradition treaty, that fact alone will not defeat the jurisdiction of the federal court.

In United States *v. Alvarez-Machain*,[323] the Supreme Court held that a federal court could try a defendant who was kidnapped and brought to the United States for trial. The Court had stated this principle in prior cases.[324] However, the *Alvarez-Machain* case was different because the Court was faced with a case where United

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[318] *See generally* GERHARD VON GLAHN, LAW AMONG NATIONS, ch. 12 (Extradition) (6th ed. 1992); Alona E. Evans, *Extradition and Rendition: Problems of Choice, in* INTERNATIONAL ASPECTS OF CRIMINAL LAW: ENFORCING UNITED STATES LAW IN THE WORLD COMMUNITY 1 (Richard B. Lillich ed., 1981) [hereinafter INT'L ASPECTS OF CRIM. LAW].

[319] 18 U.S.C.S. § 3181 (Law. Co-op. 1994).

[320] Under the theory of double criminality, an act must be criminal in the country requesting extradition and the country where the accused is found. G. Nicholas Herman, et. al., *Double Criminality and Complex Crimes, in* INTERNATIONAL CRIMINAL LAW: A GUIDE TO U.S. PRACTICE AND PROCEDURE 365 (Ved P. Nanda & M Cherif Bassiouni eds., 1987) [hereinafter INT'L CRIM. LAW: A GUIDE]. In addition, some extradition treaties also contain a limited list of extraditable crimes. *See* VON GLAHN, *supra* note 318, at 285.

[321] VON GLAHN, *supra* note 318, at 286-87. *See also* 76 AM. J. INT'L L. 154 (1982) (summarizing modern extradition procedures).

[322] *See generally* sources cited *supra* note 318. *See also* Paul B. Stephan III, *Constitutional Limits on International Rendition of Criminal Suspects, in* INT'L ASPECTS OF CRIM. LAW, *supra* note 318, at 34; and G. Nicholas Herman, et. al., *Double Criminality and Complex Crimes, in* INT'L CRIM. LAW: A GUIDE, *supra* note 320, at 365.

[323] 112 S. Ct. 2188 (1992).

[324] Ker v. Illinois, 119 U.S. 436 (1886).

States officials were responsible for the kidnapping.[325] In essence, the Court was not concerned about how the United States gained custody of the defendant. **As** long as the extradition treaty itself did not limit the jurisdiction of the court in the case of forcible abduction, "the court need not inquire as to how respondent came before it."[326]

In *Alvarez-Machain*, the defendant was a Mexican citizen. The Court has yet to address the issue of a forcible abduction of a United States citizen from a foreign country. It has, however, upheld jurisdiction in a forcible abduction case played out across state lines within the United States. The Court affirmed jurisdiction, despite objections based on due process and possible violations of federal kidnapping laws.[327] Without addressing the specific issue of citizenship, the Court in *Alvarez-Machain* relied in part on the interstate kidnapping case.

Of course, formal extradition is the preferred method of obtaining custody. Yet, custody is only part of the battle. If the United States can get the defendant into federal court, it then faces the constitutional and court-made rules of procedure and rules of evidence.

b. Federal Criminal Procedure — From the very first stages of a federal prosecution, federal procedural rules pose obstacles to any exercise of extraterritorial jurisdiction. There are no United States magistrates overseas to issue arrest warrants.[328] If an arrest is made without a warrant, the Supreme Court requires a magistrate's hearing within forty-eight hours.[329] At this hearing, the

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[325]"The District Court concluded that [United States] DEA agents were responsible for respondent's abduction, although they were not personally involved in it." *Alvarez-Machain,* 112 S. Ct. at 2190.

[326]*Id.* at 2193. The Court also rejected the argument that the kidnapping violated customary international law and that the extradition treaty must be interpreted consistent with international law. Id. at 2195.

[327]Frisbie v. Collins, 342 U.S. 519 (1952).

[328]18 U.S.C.S. § 3041 (Law. Co-op. 1994) lists authorized magistrates. Military magistrates are not federal magistrates within the meaning of the statute. ***See*** *also* DEP'T OF *ARMY* REG. 27- 10, MILITARY JUSTICE, ch. 9 (8 Aug. 1994) [hereinafter AR 27-101. Paragraph 9-1b of the regulation states that "[tlhere is no relationship between the Military Magistrate Program and DA's implementation of the Federal Magistrate System to dispose judicially of . . . minor offenses committed on military installations." This passage indicates that the Army does not consider a military magistrate to have the powers of a federal magistrate.

[329]County of Riverside v. McLaughlin, 500 U.S. 44 (1991). Under the federal rules, the court can extend many of the time limits if the government can prove extraordinary circumstances that require the extension in the interests of justice, FED. R. CRIM. P. 5(c), or if the government can prove that the defendant was absent or unavailable, 18 U.S.C.A. § 3161(h)(3) (West 1993). Yet, as every trial practitioner knows, when the government must prove something like "extraordinary circumstances'' or "unavailability," the case is put at risk. There is never a guarantee that the judge will agree with the government's assessment of the circumstances. Federal law also provides special rules for extradition cases. However, the majority of the rules apply to the extradition of persons from the United States to other countries. ***See generally*** 18 U.S.C.A. §§ 3181-3196 (West 1993). The statutes that address extradition to the United States speak in terms of returning that person "to the jurisdiction from which he has fled." 18 U.S.C.A. § 3183 (West 1993).

defendant must be informed of his right to retain counsel, and counsel must be appointed if the defendant is indigent.[330]

There is also the question of whether the United States has the authority to make arrests in a foreign country, and if so, who has the authority to arrest and detain the person.[331] Add to this the question of whether bail will be an option,[332] and if so, who will determine whether to grant bail. These and many other procedural matters will arise if a defendant is arrested in a foreign country and held for extradition to the United States for trial in federal court. The military may find it difficult to meet many of these requirements under the best of circumstances; in the midst of a military operation it may be impossible.

c. Subpoenas and Evidence—The Sixth Amendment guarantees every accused the right "to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor."[333] The prosecution, too, must be able to secure evidence to prove its case. In the United States, witnesses and evidence are obtained through an uncomplicated subpoena process.[334] However, subpoenas only work if they can be enforced, and they can only be enforced if the courts have jurisdiction to exercise their contempt power. Generally, federal courts have no jurisdiction over foreign nationals outside of the United States. Consequently, the courts cannot compel foreign nationals to travel to the United States to testify,[335] and federal subpoenas will not normally reach documents or other evidence located in foreign nations.[336]

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[330]FED. R. CRIM. P. 5(c). During a deployment overseas, it is unlikely that a civilian defense counsel will be available. If there is a defense counsel present, chances are she or he will be a military attorney who is only authorized to represent military personnel. AR 27-10, *supra* note 328, para. 6-2. Although the regulation could be changed to allow military counsel to represent civilians, once an attorney-client relationship is formed, that counsel may be required to continue that representation. If trial is then held in federal court in the United States, that military counsel would no longer be available to perform services for the deployed soldiers.

[331]Senator Inouye's bill would allow the military police to "apprehend and detain" any person subject to jurisdiction under the bill. S. 74, 104th Cong., 1st Sess. (1995).

[332]U.S. CONST. amend. VIII states that "excessive bail shall not be required." The Supreme Court has held that an accused has a right to be released on bail if he can give "adequate assurance that he will stand trial." Stack v. Boyle, 342 U.S. 1 (1951).

[333]U.S. CONST. amend. VI.

[334]FED. R. CRIM. P. 17.

[335]*Id.* 17(e)(2) provides that a "subpoena directed to a witness in a foreign country shall issue . . . and be served as provided in Title 28, U.S.C. § 1783." The statutory provision only provides for a subpoena over United States "citizens or nationals in a foreign country." 28 U.S.C.S. § 1783 (Law. Co-op. 1994).

[336]*Id. Cf.* Bruce Zagaris & Constantine G. Papavizas, *Recent Decisions by United States Courts on the Exercise of Subpoena Powers to Secure Evidence Abroad in Criminal Mutters, in* INT'L CRIM. LAW: A GUIDE, *supra* note 320, at 301; Sigmund

The federal rules provide for foreign depositions; however, the foreign nation must "permit"the deposition process.[337] Then, even if the foreign nation permits the deposition, the prosecution cannot use a deposition in a criminal proceeding without the defendant's consent.[338]

Status of forces agreements or treaties could provide for compulsory process to secure evidence and witnesses, but negotiating the necessary agreements would be a long and uncertain undertaking. Even so, coming back to the original problem of jurisdiction during military operations, these procedures may still not be adequate to address the practical realities of securing evidence and witnesses during an armed conflict or other military operation.

Time is often of the essence if the government hopes to obtain evidence during military operations. Witnesses are killed or "disappear" and evidence is lost or destroyed. Recent events in Somalia, Rwanda, and Haiti show how mobile a refugee population can be. Any procedural rules for trials in these circumstances must meet the realities of the situation on the ground. Otherwise, the ability to prosecute will be meaningless.

B. Court-Martial Jurisdiction Over Deployed Civilians

Trial by court-martial represents the other possible tribunal for exercising jurisdiction. Courts-martial have the advantage of being standing tribunals.[339] Plus, the military has a long history of holding courts overseas and dealing with the custody and evidence problems that arise in foreign countries.[340] In addition to their pro-

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Timberg, *Obtaining Foreign Discovery and Evidence in U.S. Antitrust Cases: The Uranium Cartel Maelstrom, in* INT'L ASPECTS OF CRIM. LAW, *supra* note 318, at 90. These two articles explore the reach of United States subpoena power over foreign nationals and foreign corporations that have connections to the United States. Both articles point out that many nations consider United States efforts to enforce its subpoena power abroad to be an affront to their national sovereignty.

[337] 18 U.S.C.A. § 3507 (West 1993).

[338] *See generally* Idaho v. Wright, 497 U.S. 805 (1990); Ohio v. Roberts, 448 U.S. 56 (1980)(defining extent of defendant's confrontation rights in criminal prosecutions).

[339] Technically, courts-martial are not "standing courts," because each court-martial is "created" when it is convened. *See* MCM, *supra* note 26, R.C.M. 503(a). Practically, the procedures for convening a court-martial are quite simple, and the MCM provides rules of procedure and evidence for all courts-martial.

[340] UCMJ art. 7 (1988) grants "[c]ommissioned officers, warrant officers, petty officers, and noncommissioned officers [the] authority to . . . apprehend persons subject to this chapter." *See also* MCM, *supra* note 26, R.C.M. 302. The UN Model SOFA authorizes the host government to arrest civilians who are members of the peacekeeping operation, and then to turn them over to the custody of a UN representative. UN Model SOFA, *supra* note 274, paras. 41, 42. Similarly, the NATO SOFA provides for "[t]he authorities of the receiving and sending States [to] assist each other in the arrest of members of a force or civilian component . . . and handing them over to the authority which is to exercise jurisdiction." NATO SOFA, *supra* note 16, art. VII5(a).

cedural advantages, courts-martial have an important practical advantage: the international community is accustomed to allowing military courts-martial to operate on foreign soil.[341]

With those observations, this section brings the jurisdictional problem full circle: court-martial jurisdiction is in many ways the best method for exercising jurisdiction over civilians overseas. However, if the military intends to court-martial civilians, court-martial procedures must be changed to meet the requirements of Article III and the Fifth and Sixth Amendments, or the United States must base court-martial jurisdiction over civilians on constitutional war powers.

Civilians deployed on military operations represent a small subset of the civilians associated with the military. However, for military and international reasons, they are a critical subset. Commanders must be able to exercise effective command and control over all members of the force who are deployed on military operations—both military and civilian.[342] In addition, military operations place civilians in numerous situations that can trigger United States international obligations to prosecute or extradite those civilians.[343]

1. Advantages of Court-Martial Jurisdiction—The major advantage of court-martial jurisdiction over civilians is that it can be based on the war powers of the President and Congress. When the President and Congress exercised their constitutional powers to provide for courts-martial, they designed those courts to meet the exigencies of the battlefield and suited them to operate on foreign soil.

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[341] The **NATO** SOFA, *supra* note 16, art. VIII(a), states that "the military authorities of the sending State shall have the right to exercise *within the receiving State* all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State" (emphasis added); the Korean **SOFA,** *supra* note **274,** does not explicitly provide for courts-martial to be held in Korea. However, art. XXII implies that such is the case, through provisions for custody and for investigatory assistance. Likewise, the **UN** Model **SOFA,** *supra* note **274,** arts. 41, 44 implies that courts-martial can be held in the host nation. Common sense would also imply that a grant of jurisdiction to the military authorities also carries with it the concomitant grant of authority to exercise that jurisdiction through a court-martial. *See also* Schooner Exchange, 11 U.S. (7 Cranch) **116,** 140 **(1812)** ("The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require."). While the waiver of all jurisdiction is no longer implied, the logic of the Court's argument still holds: when a commander is given jurisdiction, that grant of jurisdiction implies that the commander has the right to discipline his army.

[342] During Operations Desert Shield and Desert Storm, "[t]here was a widely perceived lack of command and control over contractors." Contractor Support, *supra* note **153.**

[343] *See supra* notes **172-212** and accompanying text.

In the Reid cases, the Supreme Court indicated that the military cannot subject civilians to courts-martial during peacetime. As the Court confirmed, trial by court-martial must be tied to Congress's power to "make rules for the government and regulation of the land and naval forces."[344] Likewise, the Fifth Amendment requirement for a grand jury indictment is suspended for "cases arising in the land or naval forces."[345]

In Reid, the Court "recognize[d] that there might be circumstances where a person could be 'in' the armed services for purposes of [Article I, section 8,] Clause 14 even though he had not formally been inducted into the military." Clearly, in the Court's opinion, dependent wives did not fall into this category. When Congress provided for Article I court-martial power over all civilians accompanying the forces overseas in peacetime, Congress passed the breaking point of its war powers. Conversely, a limited and necessary extension of jurisdiction over civilians deployed on military operations overseas is within Congress's war powers to regulate the forces.

Jurisdiction over deployed civilians will meet America's most critical need to have jurisdiction over civilians during military operations in unfamiliar and possibly hostile countries. As American military forces decrease their permanent overseas presence and concentrate at posts and bases in the United States, fewer civilians will be assigned to permanent overseas bases. "Force projection'' deployments will become the norm. This, in turn, will decrease the need for peacetime jurisdiction over civilians and increase the need for jurisdiction over civilians during deployments.

2. Disadvantages *of* Court-Martial Jurisdiction — Although Congress can expand court-martial jurisdiction over deployed civilians with only minor changes to the UCMJ, it may be difficult for Congress to muster the necessary political support for any change. This jurisdictional problem has been with us for several decades, and solutions have been proposed at regular intervals.[346]

Additionally, because court-martial jurisdiction during deployments is a limited expansion of jurisdiction, it will leave gaps that more comprehensive solutions could fill. The United States would continue to lack jurisdiction over civilian employees and family members stationed at permanent overseas garrisons and over ex-service members.

Even for civilians deployed on military operations, the military

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[344] U.S. CONST. art. I, § 8, cl. 14.

[345] *Id.* amend. V.

[346] *See* bills cited ***supra*** note 2.

may lose jurisdiction once the civilians return to the United States. Consequently, civilians could commit crimes and escape punishment if the crimes are not discovered until after the civilians return from the deployment. It may be possible to close the "returning civilian gap" with federal court jurisdiction, but federal courts would still lack effective subpoena powers, as discussed earlier.

Triggering jurisdiction over civilians deployed on military operations would require a long definition or a complicated list of triggering factors. Alternatively, the statute could leave the definitional problems to the courts. Either way, jurisdiction would be based on fairly subjective criteria that the prosecution would be required to prove at each court-martial, and the government could count on the issue being relitigated on appeal.[347]

V. Proposed Solution — Court-Martial Jurisdiction over Civilians Deployed on Military Operations

Court-martial jurisdiction over civilians deployed on military operations is neither the perfect nor the ideal way to fill the jurisdictional void. However, reaching for the ideal solution is not practical nor necessary. There are very few perfect laws in a democracy where every solution tends to represent a compromise. This proposed solution is no different: it too represents a compromise between constitutional war powers and individual rights.

Court-martial jurisdiction will give the United States jurisdiction over a much smaller class of civilians, but it will be necessary and meaningful jurisdiction supported by effective trial procedures. Unlike federal courts, courts-martial are designed to protect individual rights while still providing the means to try cases in the midst of an ongoing military operation in foreign territory.

In the area of criminal jurisdiction and procedure, each solution must balance the needs of society against the rights of the individual. In *Toth v. Quarles*, Justice Black articulated how the military and Congress should balance these competing interests: "Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to *'the least possible power adequate to the end* ***pro-***

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[347] In Sands v. Colby, **35** M.J. 620 (A.C.M.R. 1992), Sands filed a writ of mandamus and a stay of proceedings (after arraignment but before trial) to challenge the jurisdiction of the court-martial. See cases cited in *Sands* for court's authority to issue writs of mandamus for lack of jurisdiction. *Id.* at **621.** If the military judge at trial finds no jurisdiction, the government can file an interlocutory appeal. UCMJ art. 62 (1988).

posed.'"[348] Under Toth, the question is whether court-martial jurisdiction is necessary for the military mission.

Court-martial jurisdiction over civilians during overseas military operations adds only a narrow category of civilians, but these civilians represents the crucial core of the jurisdictional void. The United States reputation and international obligations demand that, at a minimum, these civilians be subject to the laws of the United States and subject to the control of military commanders. America's modern military missions require court-martial jurisdiction over deployed civilians.

Without courts-martial under war powers, the only practical alternative is the alternative suggested by Justice Black in Reid: "If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes."[349]

The United States has not yet reached the point where it must resort to constitutional amendments to meet its foreign commitments. It is not necessary to try these cases in federal court, to drastically change courts-martial procedure, or to amend the Constitution.

A. Constitutionality *of* Court-Martial Jurisdiction

Court-martial jurisdiction over deployed civilians can be supported by historical analogy, and it can be supported constitutionally through the combined war powers of the President and Congress. In addition, modern courts-martial bear little resemblance to the days when "military justice [was] a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties."[350]

1. Military Necessity — 'From a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punish-

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[348] Toth v. Quarles, 350 U.S. 11, 23 (1955).

[349] Reid v. Covert, 354 U.S. 1, 14 (1957).

[350] *Id.* at 35-36. See also Weiss v. United States, 114 S. Ct. 752 (1994). "The care the Court has taken to analyze petitioners' claims demonstrates once again that men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service. Today's decision upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history." Id. at 769 (Ginsburg, J. concurring).

ment of some civilians in that area by military courts under military rules."[351] In *Reid,* Congress simply went too far; the Court rejected the government's contention that Congress could expand the concept of jurisdiction over civilians accompanying the army "in the field" to include jurisdiction over wives and other civilians in peacetime. The Court did not, however, indicate that the military could only court-martial civilians during a declared war. Rather, the plurality opinion in *Reid* spoke about the lack of "actual hostilities," of "areas were no conflict exists," and of areas without "active hostilities."[352] In *McElroy,* the Court endorsed the constitutionality of court-martial jurisdiction over civilians during the "Indian uprisings . . . based on the legal concept of the troops being 'in the field"' during "hostilities."[353]

Clearly, the Court did not close the door on all court-martial jurisdiction over civilians. The Court merely forced courts-martial back to their constitutional roots. If courts-martial are not tied to the power of Congress to make rules and regulations for the military or to the President's powers as commander in chief, they are not constitutional.

Before the *Reid* cases, the military limited its jurisdiction over civilians to wartime or to those times when civilians were with the Army "in the field." Colonel Winthrop, whom the Supreme Court called "[t]he recognized authority on court-martial jurisdiction,"[354] defined the limits of jurisdiction over "persons serving with the armies in the field."[355] He then admonished military practitioners regarding the use of this jurisdiction: "This Article, in creating an exceptional jurisdiction over civilians, is to be strictly construed and confined to the classes specified."[356]

In *Toth* and *Singleton,* the Supreme Court echoed Colonel Winthrop's admonition: "[T]he Clause **14** 'provision itself does not empower Congress to deprive people of trials under Bill of Rights safeguards' . . . . [M]ilitary tribunals must be restricted 'to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service'. . . ."[357]

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[351] *Reid,* 354 U.S. at 33. The Court cites to the Articles of War (1775), *reprinted in* WINTHROP, *supra* note 4, at 953, for support of this statement.

[352] *Reid,* 354 U.S. at 34-35.

[353] McElroy v. Gualiardo, 361 U.S. 281, 285-86 (1960). ***See*** *also* WINTHROP, *supra* note **4,** at 101.

[354] *McElroy,* 361 U.S. at 284.

[355] WINTHROP, *supra* note 4, at 99.

[356] *Id.* at 100. Winthrop makes his point by noting several cases where The Judge Advocate General disapproved war-time courts-martial because the defendants were not actually "serving with the army." *Id.* at 100 & **n.9.**

[357] *McElroy,* 361 U.S. at 239-40 (quoting Toth v. Quarles, 350 U.S. 11, 21-22 (1955)).

If Congress and the military had heeded Colonel Winthrop's advice, the *Reid* cases may never have occurred. If Congress and the military now heed his advice, civilians deployed with the armed forces "in the field" could once again be tried by court-martial. The military must step back, define its jurisdictional needs, and confine courts-martial over civilians to their constitutional limits.

Unfortunately, the limits of constitutional war powers cannot be measured with precision. However, a conservative and reasoned expansion of court-martial jurisdiction over deployed civilians is within those constitutional limits. Civilians who deploy into operations are essential to the military mission.[358] Their numbers are limited and they perform specific, specialized tasks.

As the law now stands, jurisdictional issues are driving military decisions. As Alexander Hamilton noted in *The Federalist,* the founders designed the Constitution to allow jurisdiction to flow from military necessity rather than dictate military decisions:

> The authorities essential to the common defence are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, *because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.* . . . This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defence.[359]

2. The War Powers Equation — In many cases, the Supreme Court has agreed with Hamilton's observation that Congress should be given great power over military matters. Even in cases that pit the Bill of Rights against Congress's powers to regulate the military, the Court has recognized that military necessity must prevail — but only in cases of true necessity. If constitutional principles can be expressed as mathematical equations, the variables would be shown as follows:

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[358] *See* DOD DIR. 1404.10, supra note 182. See *also* Audit Report, Dep't of Defense Office of the Inspector General, Report 91-105, subject: Civilian Contractor Overseas Support During Hostilities (June 26, 1991). "If contractors leave their jobs during a crisis or hostile situation, the readiness of vital defense systems and the ability of the Armed Forces to perform their assigned missions would be jeopardized." *Id.* at 1.

[359] THE FEDERALIST No. 23 (Alexander Hamilton).

IF	Congressional and Presidential War Powers	t	Military Necessity	>	Individual Rights	THEN	The Action is Constitutional

As with any equation, begin with the known and solve for the unknown; with law and precedent, courts work from analogy. There are many examples of military actions being weighed against individual rights, and there are several significant cases that explore the limits of presidential and congressional war powers. An examination of these cases produces insights into why the Supreme Court found court-martial jurisdiction over civilians in peacetime unconstitutional, and into why the Court will uphold court-martial jurisdiction over civilians deployed with the armed forces on military operations.

In Parker *v. Levy*,[360] the Supreme Court upheld the conviction of an Army captain who was tried by court-martial for conduct unbecoming an officer for making public anti-war statements to enlisted soldiers during the Vietnam war. Captain Levy contended that his speech was protected under the First Amendment and that UCMJ Article **133** (conduct unbecoming an officer) was void for vagueness. The Court recognized that "members of the military are not excluded from the protection granted by the First Amendment;"[361] however, according to the Court, "the different character of the military community and of the military mission requires a different application of those protections."[362]

In Parker *v.* Levy, the Supreme Court first stated the often quoted phrase that "the military is, by necessity, a specialized society separate from civilians society." On the basis of the military's separate and specialized nature, the Court has gone on to uphold many other military actions in the face of Bill of Rights challenges.[363] In each case, however, the Court comes back to the underlying justification for these infringements on individual constitu-

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[360] 417 U.S. 733 (1974)

[361] *Id.* at 758.

[362] *Id.*

[363] *See, e.g.,* Goldman v. Weinberger, 475 U.S. 503 (1986) (Army uniform regulations survived freedom of religion challenge; military can prevent wearing of yarmulke; Court deferred to professional judgment of commanders about need for uniformity); Brown v. Glines, 444 U.S. 348 (1980) (Air Force regulation requiring prior approval before a petition could be circulated on post survived freedom of speech and association challenge; allowed because of commander's need to ensure that speech does not interfere with overriding military mission); Korematsu v. United States, 323 U.S. 214 (1944) (Japanese internment during World War II allowed under war and emergency powers); Katcoff v. March, 755 F.2d 223 (2d Cir. 1985) (Army Chaplain Corps does not violate separation of church and state; allowed

tional rights: "[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."[364] The Court grants great deference to the military to pursue that mission.[365]

In each war powers case, the Court focused on the military mission and whether the infringement on individual rights was necessary to meet that mission. In Reid and Singleton, the Court "did not think 'that the proximity . . . of these women to the 'land and naval Forces' [was] . . . clearly demanded by the effective 'Government and Regulation' of those forces.'"[366]

In Youngstown Sheet and Tube *v. Sawyer*,[367] the Supreme Court reviewed President Truman's actions in seizing privately owned steel mills during a nationwide steel strike. In Youngstown, President Truman was relying, in part, on his war powers to keep a supply of steel flowing to the Korean war effort.[368] Over time, the case has been cited more for Justice Jackson's concurring opinion than for its actual holding. Justice Jackson saw presidential and congressional power in terms of constitutional additions and subtractions of power. According to Justice Jackson, when the President and Congress add their powers together, the President's "authority is at its maximum, for it includes all that he possesses . . . plus all that Congress can delegate."[369]

If Congress and the President were to act together to expand court-martial jurisdiction over civilians deployed on military operations, according to Justice Jackson's equation, they would be at their "maximum" power. Justice Jackson went on to say that if the

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because of military necessity to support free exercise of religion, especially during overseas deployments); Nation Magazine v. Department of Defense, 762 F. Supp. 1558 (S.D.N.Y. 1991) (military logistic or security concerns may allow military to limit journalists' access to information). *But* see Anderson v. Laird, 466 F.2d 283 (D.C. Dir. 1972) (mandatory chapel attendance at West Point struck down; court could not find legitimate mission-related reason for attendance that could override freedom of religion and entanglement challenge).

[364] *Parker*, 417 U.S. at 743 (quoting Toth v. Quarles, 350 U.S. 11, 17 (1955)).

[365] *See* cases cited supra note 363. The extreme high point of deference to the military came in Korematsu, 323 U.S. at 214 (the Japanese internment case). In his concurring opinion, Justice Frankfurter described the interface between war powers and the Constitution: "If a military order. . . does not transcend the means appropriate for conducting war, such action by the military is . . . constitutional." *Id.* at 225 (Frankfurter, J. concurring). While the *Korematsu* case has been discredited over the years because of its extreme deference to the military, the underlying principles still hold.

[366] Kinsella v. Singleton, 361 U.S. 234, 241 (1960) (quoting Reid v. Covert, 354 U.S. 1, 46-47 (1957)).

[367] 343 U.S. 579 (1952).

[368] *Id.* at 587.

[369] *Id.* at 635 (Jackson, J. concurring).

President and Congress act together and the Court finds their combined acts unconstitutional, "it usually means that the Federal Government as an undivided whole lacks power."[370]

The Article I powers of Congress include the power to "raise and support Armies"[371] and the power to "make Rules for the Government and Regulation of the land and naval Forces."[372] The President has his Article II powers as Executive and Commander-in-Chief,[373] as well as his foreign affairs power.[374] The Fifth Amendment requires grand jury indictments for all cases except those that "aris[e] in the land or naval forces."[375]

> These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences . . . and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other.[376]

When Congress and the President act together to authorize court-martial jurisdiction, their actions are in complete accord with their constitutional powers. Unfortunately, the *Reid* cases are an example of the President and Congress going too far—the government as a whole lacked the power to court-martial civilians during peacetime. The military connection was too tenuous, and the need was too remote.

Conversely, jurisdiction over civilians during military operations is a limited and necessary expansion of court-martial jurisdiction. The civilians are necessary to accomplish the military mission,[377] and jurisdiction over those civilians is necessary to insure mission accomplishment and to meet America's international obligations.

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[370] *Id.* at 636 (Jackson, J. concurring).

[371] U.S. CONST. art. IO 8, cl. 12.

[372] *Id.* art. I § 8, cl. 14.

[373] *Id.* art II §§ 1, 2.

[374] *Id.* art II § 2, cl. 2. *See also* United States v. Curtiss-Wright, 299 U.S. 304 (1936) (classic commentary on the expansiveness of President's foreign affairs power).

[375] Note that the Fifth Amendment does not speak about *persons* in the land and naval forces; it speaks about *cases* arising in the land and naval forces. U.S. CONST. amend. V.

[376] Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857).

[377] *See* DOD DIR. 1404.10, *supra* note 182, para. D1 (civilians are deployed only if they are "specifically required to ensure the success of combat operations or the availability of combat-essential systems").

International obligations alone will not justify an expansion of court-martial jurisdiction. The Reid case closed the door on any such theory. When the Reid court looked at the issue of whether trial by court-martial could be justified by international status of forces agreements, its answer was clear: "The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."[378]

While a treaty cannot "confer power on the Congress," United States international obligations are relevant to the scope and success of the military mission. Today's military operations must succeed on several levels. The United States must win the military war, must win the media and propaganda war,[379] and must win national and international support. For example, Operation Desert Storm could have been put in jeopardy if an American civilian had committed a war crime or other serious felony and escaped punishment. An event like that could have easily upset the delicate balance of interests that held the coalition forces together.

3. Courts-Martial Have Changed Since 1957—Over the past four decades, Congress and the military have made numerous due process improvements to the military justice system.[380] Some of the most significant changes have occurred in the past ten years alone. The Supreme Court noticed these developments and has shown its approval in several recent cases. The change in attitude, however, was slow in coming.

After Reid, the Supreme Court's opinion of the court-martial system reached its nadir in 1969, when the Court decided O'Callahan *v. Parker*.[381] In O'Callahan, the Court held that the military could only court-martial service members when their offenses

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[378] Reid v. Covert, 354 U.S. 1 (1957). *See also* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 228 (2d ed. 1988).

[379] For an interesting essay on the impact of media and propaganda on modern warfare, see TOFFLER, *supra* note 6, ch. 18. *See also* Brigadier General Michael C. Wholley, Director, Judge Advocate Division, Headquarters Marine Corps, Address at The Judge Advocate General's School, United States Army, Charlottesville, Virginia. (Mar. 24, 1995). Brigadier General Wholley noted that CNN is now with the military on every operation. As he stated, "it should not make a difference in how we operate—it just makes it more important to do it right." He also commented that United States military operations are judged on the moral component of the operation as well as whether they achieve their military objectives.

[380] *See generally* Walter T. Cox 111, *The Army, The Courts, and the Constitution: The Evolution of Military Justice*, Speech delivered at the United States Army History Institute (Mar. 19, 1987), *reprinted in* 118 MIL. L. REV. 1 (1987); Gates & Casida, *supra* note 146, at 140.

[381] 395 U.S. 258 (1969).

were adequately service connected.[382] It is impossible to read *O'Callahan* without noticing how much the *O'Callahan* opinion echoed the *Reid* cases and the Court's general dissatisfaction with courts-martial. In fact, in *O'Callahan*, the dissatisfaction rose to the level of palpable disdain. The Court began by stating that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."[383] The Court added the finishing touch with its comparison of courts-martial to civilian trials: "A civilian trial . . . is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice."[384]

In the past ten years, however, the Supreme Court has shown its increasing approval of court-martial procedures. The assent from the depths began with *Solorio v. United States* in 1987.[385] In the first paragraph of *Solorio*, the Supreme Court expressly overruled its *O'Callahan* decision. The Court then noted that the Constitution gives Congress, and not the courts, the power to regulate the military. The Court went on to cite a long list of cases where they had deferred to the "congressional authority to raise and support armies and make rules and regulations for their governance."[386]

More recently, the Supreme Court looked at "whether the current method of appointing military judges violates the Appointments Clause of the Constitution, and whether the lack of a fixed term of office for military judges violated the Fifth Amendment's Due Process Clause."[387] The Court noted that several changes to the UCMJ had "changed the system of military justice so that it has come to more closely resemble the civilian system."[388] After several other favorable observations on the military justice system, the Court upheld the appointment of military judges, and concluded that the "provisions of the UCMJ . . . sufficiently preserve judicial impartiality so as to satisfy the Due Process Clause."[389]

Perhaps the most striking change from the Court's earlier comment that courts-martial "are singularly inept in dealing with the nice subtleties of constitutional law"[390] came in 1994 in its own sub-

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[382] *Id.* at 272.
[383] *Id.* at 265.
[384] *Id.* at 266.
[385] Solorio v. United States, 483 U.S. 435 (1987).
[386] *Id.* at 447-48.
[387] Wiess v. United States, 114 S. Ct. 752, 754-55 (1994).
[388] *Id.* at 759.
[389] *Id.* at 762.
[390] O'Callahan v. Parker, 395 U.S. 258, 265 (1969).

tle way. In Davis *v.* United *States,*[391] a military accused made an equivocal request for counsel during an interrogation. What is remarkable is that the Court used a military court-martial case to make a constitutional distinction in a rights waiver case—a constitutional distinction that will now apply to all criminal cases in the United States.[392]

The Davis and Solorio cases made their way to the Supreme Court through one of many congressional improvements to the military justice system: those cases were heard on direct appeal. Prior to the 1984 changes to the UCMJ, federal courts reviewed courts-martial only through habeas corpus petitions,[393] under a very limited review standard. Federal courts reviewed court-martial only for lack of jurisdiction and illegal punishment.[394] Numerous other changes have favorably transformed courts-martial proceedings and military jurisprudence.[395]

Although the military justice system has changed greatly, it still does not provide for grand juries, trial by jury, or Article III judges. However, the more courts-martial resemble American civilian trials, the more palatable court-martial jurisdiction over civilians will be—for Congress, for the Court, and for the American public. The military justice system in place today grants every defendant "a fair trial in a fair tribunal."[396]

B. Triggering Court-Martial Jurisdiction

Defining when civilians will be subject to court-martial jurisdiction is perhaps the most difficult aspect of fashioning a limited jurisdictional solution. As discussed previously, the government can prove jurisdiction based on nationality or jurisdiction based on an employment or a familial relationship. In contrast, the government

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[391] 114 S. Ct. 2350 (1994).

[392] After noting that the COMA applied the Supreme Court's Fifth Amendment cases to all military prosecutions, the Supreme Court "proceed[ed] on the assumption that our precedents apply to courts-martial just as they apply to state and federal criminal prosecutions." *Id.* at 2354 n.*.

[393] UCMJ art. 67a (1988). See *also* Cox, *supra* note 380, at n.14 (discussing the Militaly Justice Act of 1983, which allows direct petitions to the Supreme Court).

[394] Dynes v. Hoover, 61 U.S. (20 How.) 65, 82-83 (1857).

[395] *See generally* Cox, *supra* note 380; Gates & Casida, *supra* note 146, at 140; John R. Howell, *TDS:* The Establishment *of* the *U.S.* Army Dial Defense *Service,* 100 MIL. L. REV. 4 (1983) (discussing numerous improvements, such as UCMJ art. 31 right against self-incrimination, right to representation, creation of an independent trial judiciary, and direct review by civilian judges of COMA and by the Supreme Court).

[396] Weiss v. United States, 114 S. Ct. 752, 761 (1994) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

must prove jurisdiction during overseas military operations by looking at several factors. By nature, the proof would be more subjective than objective.

Fortunately, Congress has already defined those deployments that trigger war powers in the War Powers Resolution.[397] According to the War Powers Resolution, "[i]n the absence of a declaration of war" the following situations implicate an exercise of constitutional war powers: when forces are introduced (1) "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances," (2) into a "foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces," or (3) into a foreign nation "in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation."[398] While no President has ever acknowledged the constitutionality of the War Powers Resolution, every President has reported to Congress "consistent with the War Powers Resolution"[399] when troops were deployed in one of these three instances.[400]

It is neither necessary nor prudent to tie court-martial jurisdiction to the War Powers Resolution or to a presidential report under the War Powers Resolution. Rather, the War Powers Resolution factors merely provide a functional model to determine when forces are deployed on military operations. Furthermore, the War Powers Resolution model provides a historical reference and a body of law.

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[397]50 U.S.C.S. §§ 1541-1548 (Law. Co-op. 1994). The War Powers Resolution has never been tested in court, and many scholars question whether it is constitutional. However, the most serious constitutional issues stem from the fact that the Resolution is seen as a congressional attempt to limit the President's war powers or that it could be viewed as a legislative veto. The War Powers Resolution sets up a classic power struggle between the President and Congress. These particular constitutional concerns will not, however, affect any expansion of jurisdiction during military deployments based on the War Powers Resolution triggering factors. In the area of jurisdiction, there will not be a power struggle; Congress and the President would be working together to exert their combined powers to expand jurisdiction. For a general discussion of the constitutional issues raised by the War Powers Resolution, see STEPHEN DYCUS, ET AL., **NATIONAL** SECURITY **LAW** 119-37 (1990), and sources cited therein.

[398]850 U.S.C.S. § 1541(a) (Law. Co-op. 1994).

[399]***See, e.g.***, Ellen C. Collier, Library of Congress, Congressional Research Service, ***The*** War Powers Resolution: Fifteen *Years of* Experience (Aug. 3, 1988) (listing all War Powers Resolution Reports from 1973-1991).

[400]*But* ***see*** Crockett v. Reagan, 558 F. Supp. 893, *aff'd* per curiam, 720 F.2d 1355 (D.C. Cir. 1983), **cert.** denied, 467 U.S. 1251 (1984) (29 members of Congress brought suit to force President to submit War Powers Resolution Reports to Congress regarding deployment of forces to El Salvador; case presents political question not subject to judicial review; may have been different if Congress had acted as a whole).

The War Powers Resolution model covers most, if not all, recent military deployments. Presidents have submitted reports "consistent with the War Powers Resolution" for Grenada, Panama, Desert Shield, Desert Storm, Provide Comfort (humanitarian assistance in Iraq), Somalia, Macedonia, and Haiti, among others.[401] These operations cover the spectrum of military operations other than war: from humanitarian assistance in Somalia and Iraq, through peacekeeping in Macedonia and nation-building in Haiti, and to international armed conflicts in Kuwait and Iraq.[402]

Military training and readiness exercises in foreign nations are specifically excluded from the War Powers reporting requirements.[403] Consequently, using the War Powers Resolution model, the United States would not gain court-martial jurisdiction over civilians accompanying the forces for overseas training exercises. While some military attorneys will see this as an unacceptable jurisdictional gap, it is a gap that is necessary to preserve court-martial jurisdiction.

There is a strong urge to add court-martial jurisdiction over civilians in every conceivable '(war powers" circumstance. The problem lies in the fact that the limits of constitutional war powers are uncertain. In trying to grab too much, the military could lose jurisdiction over **all** civilians. Reid should teach that lesson if nothing else.

D. Administrative and Procedural Details

1. Approval Authority — Congress and the President should place additional safeguards on the military's ability to court-martial

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[401] *See* President's Letter to Congressional Leaders on Haiti, 30 WEEKLY COMP. PRES. Doc. 1823 (Sept. 21, 1994); President's Letter to Congressional Leaders on Rwanda, 30 WEEKLY COMP. PRES. DOC. 1602 (Aug. 1, 1994); President's Letter to Congressional Leaders on the Former Yugoslav Republic of Macedonia, T29 WEEKLY COMP. PRES. DOC. 1302 (July 9, 1993); President's Letter to Congressional Leaders on the Situation in Somalia, **28** WEEKLY COMP. PRES. DOC. 2338 (Dec. 10, 1992); Collier, ***supra*** note 399 (listing presidential War Powers reports from 1973-1991, including reports for Grenada, Panama, Desert Shield, and Desert Storm).

[402] Congress has "pre-authorized deployments under the UN Participation Act, 22 U.S.C.S. § 287d-1 (Law. Co-op. 1994), for missions that "are specifically directed to the peaceful settlement of disputes." Consequently, the President may not be required to report under the War Powers Resolution. However, troops on these operations are armed for combat (self-defense), and the deployment should still fall within the War Powers Resolution factors. To dispel any doubts, the jurisdictional statute or implementing regulations should specifically include peacekeeping missions authorized under the UN Participation Act. United Nation deployments under 22 U.S.C. § 287d easily fall within the War Powers Resolution factors. Section 287d actions fall under U.N. CHARTER art. 42 ("actions to maintain or restore international peace and security").

[403] 50 U.S.C.S. § 1543(a)(2) (Law. Co-op. 1984).

civilians. To counter any fear of the military "running rampant" over civilians, the statute or implementing regulations should require high-level approval before a civilian can be tried by court-martial.

Current Army Regulations recognize that some cases should be tried by court-martial only in extraordinary circumstances. For example, the Army must follow special procedures before it can court-martial a reserve or retired soldier. For retirees, the regulation requires Department of the Army approval before charges can be referred to a court-martial,[404] and the Assistant Secretary of the Army must approve the action before the Army can order a retired soldier to active duty to face trial.[405] Reservists can only be tried while on active duty, and the Secretary of the Army must approve any orders to active duty before a reservist can be "sentenced to confinement or deprived of liberty."[406]

Civilians too should be subject to court-martial only in extraordinary circumstances. Secretarial approval for any court-martial would guarantee that extraordinary circumstances are present. In addition, secretarial approval would place court-martial power over civilians into the hands of civilians—clearly an appropriate place for that power to reside for both practical and constitutional reasons.

2. *Notice* and Training—The Department of Defense already requires the military to give all emergency essential civilians "law of war training, and training in the Uniform Code of Military Justice."[407] When civilians are actually subject to the UCMJ, however, this training will take on new importance. The military should design and implement a comprehensive training program for all emergency essential civilian personnel and civilian contract personnel.

This training is not only wise from a military standpoint, but it may also be constitutionally advisable. In Parker *v.* ***Levy,*** the Supreme Court rejected a claim that Article 133 of the UCMJ was void for vagueness.[408] In so doing, it noted that "the military makes an effort to advise its personnel of the contents of the Uniform Code, rather than depending on the ancient doctrine that everyone is presumed to know the law."[409] The Court went on to note that Article

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[404]AR 27-10, *supra* note 328, para. 5-2b(3).

[405]*Id.*

[406]*Id.* para. 21-8a.

[407]DOD DIR. 1404.10, supra note 182, at 9h. See *also* AMC CIVILIAN DEPLOYMENT GUIDE, *supra* note 181, at 39 (requires civilians to receive training on the UCMJ, Geneva Conventions, Code of Conduct, Rules of Engagement, and Status of Forces agreements).

[408]Parker v. **Levy,** 417 U.S. 733 (1974).

[409]*Id.* at 751.

137 of the UCMJ required "that the provisions of the Code be 'carefully explained to each enlisted member.'"[410] If deployed civilians are made subject to the Code, Congress should amend Article 137 to include those civilians in the training requirement. This is not to say that jurisdiction could be defeated by a lack of training or knowledge. In Parker *v. Levy,* the Court's statement about training was dicta; the case involved an officer who was tried by court-martial, and the Article 137 training requirements do not apply to officers.

Civilians who were tried during World War I argued that they could not be tried by court-martial because they did not knowingly subject themselves to military jurisdiction. In the case of a merchant seaman, the district court compared court-martial jurisdiction to federal court jurisdiction: "Assuredly one who committed a crime without knowing that he was . . . subject to [federal court] jurisdiction . . . could not . . . contest the jurisdiction upon that ground. It is proper, therefore, to determine the question of jurisdiction upon the facts and circumstances; it cannot rest upon knowledge or consent."[411]

3. When *Would* Jurisdiction *End?*—Jurisdiction under UCMJ Article **2** is stated in terms of personal jurisdiction based upon status. As a consequence, jurisdiction normally ends when that status ends. **A** statute that grants court-martial jurisdiction over civilians employees accompanying the force on overseas deployments would normally end when the deployment ends, when the civilian is no longer overseas, or when the employment ends.

In *Toth v.* Quarles, the Supreme Court examined the question of when jurisdiction ends for service members.[412] Toth served in the Air Force in Korea, received an honorable discharge, and returned to the United States. Five months later, he was arrested and returned to Korea to be court-martialed for murder. The military based its court-martial jurisdiction on a statute that granted jurisdiction over an ex-serviceman for serious offenses committed "while in a status in which he was subject to this code."[413]

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[410] *Id.* (quoting UCMJ art 137(a)(1)).

[411] *In re* Berue, 54 F. Supp. 252, 256 (S.D. Ohio 1944). In another World War II case, a ship's cook fared no better with his lack of knowledge argument: "The history of the application of military law to civilians does not disclose . . . a case in which . . . it was necessary to establish such knowledge in order to prove military jurisdiction over civilians. Congress did not say all persons knowingly accompanying or serving the army in the field." McKune v. Kilpatrick, 53 F. Supp. 80, 89 (E.D. Va. 1943).

[412] Toth v. Quarles, **350** U.S. **11** (1955).

[413] *Id.* at 13. Jurisdiction was based on UCMJ art. 3(a) (1950), which stated that "any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States . . . shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status." *Id.* at n.2.

On a petition for habeas corpus, the Court ordered Toth's release. The Court rejected the argument that jurisdiction over ex-servicemen could "be sustained on the constitutional power of Congress 'To raise and support Armies,' 'To declare War,' or to punish 'Offences against the Law of Nations.'"[414] Likewise, jurisdiction could not "rest on the President's power as commander-in-chief, or on any theory of martial law."[415] These constitutional powers, if "given [their] natural meaning . . . restrict court-martial jurisdiction to persons who are actually members or part of the armed forces."[416]

If the Court applies the *Toth* rationale to the question of jurisdiction over civilians deployed with the military, jurisdiction would end when the status of "civilian deployed with the military" ends. Therefore, status would cease at the end of the employment,[417] at the end of the military operation, or when the civilian returned to the states and was no longer "deployed." The military could retain jurisdiction during the deployment simply by not discharging employees or contractors while they were deployed. Any terminations could take effect once the civilian returned to the United States.

Unfortunately, civilians in the *Toth* circumstances — where the crime is not discovered until they have returned to the United States or have terminated their employment relationship — will escape trial by court-martial. Equally unfortunate, under current laws, they will also escape trial in federal court.

VI. Conclusion

Civilians have served with the armed forces since the Revolutionary War. Today, civilians deploy on operations to Kuwait, to Macedonia, and to Haiti, and they will continue to deploy wherever they are needed. It is time for the military to take the first step toward giving commanders the ability to command the civilian component of their force.

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[414] *Id.* at 13-14.

[415] *Id.* at 14.

[416] *Id.* at 15.

[417] *But see* Perlstein v. United States, 151 F.2d 167 (3d Cir. 1945). Termination of employment did not defeat jurisdiction over a civilian contractor during World War II. The ex-contractor was charged with stealing some jewelry while he was awaiting military transportation to return to the States. The court found that the language of article 2 of the Articles of War was controlling. That statute granted jurisdiction over all civilians who were "accompanying or serving with the armies . . . in time of war." Consequently, the military retained jurisdiction because the ex-contractor was still "'accompanying the Army at the time of the offense." *Id.* at 168-69.

A limited expansion of court-martial jurisdiction over civilians deployed on overseas military operations will give commanders the ability to command at a time when they need it most — during deployments in hostile or uncertain circumstances. Commanders need jurisdiction over deployed civilians, and it is that need that makes the jurisdiction constitutional.

In the *Reid* cases, the Supreme Court took away the military's ability to court-martial civilians stationed at peacetime overseas garrisons. However, the *Reid* cases did not mark a shift in legal reasoning so much as they marked a shift in military court-martial policy. Prior to *Reid*, the federal courts heard many habeas corpus petitions from civilians, but these were all from civilians who were court-martialed during wartime. The courts upheld jurisdiction in almost every case.

It is time to shift military courts-martial back to their constitutional roots — back to constitutional war powers and the needs of military commanders. **A** limited, reasoned expansion of court-martial jurisdiction over civilians deployed on military operations takes courts-martial back to those constitutional beginnings. It is necessary, it is proper, and it will withstand constitutional review. This limited expansion of court-martial jurisdiction will not solve the whole problem. It is a start, however, and it starts with the most critical need.

CONCLUDING HOSTILITIES: HUMANITARIAN PROVISIONS IN CEASE-FIRE AGREEMENTS

MAJOR VAUGHN A. ARY*

I. Introduction

Regardless of the reasons for war, each conflict is intended to reach an end. When it does, there are a number of issues that must be resolved. Although customary international law may provide answers to some of these issues and guidance on others, the most effective peace is achieved through an agreement between the parties to the conflict that clearly establishes the obligations of each party in accordance with the law.

Customary international law provides a number of obligations that arise at the conclusion of hostilities, but these obligations have not always been followed. The animosity that remains at the end of a conflict may tempt the prevailing party to neglect these duties and impose a form of victor's justice by dictating the terms of the peace. A cease-fire agreement in which the parties agree, not only to cease hostilities, but also to follow international law in the conclusion of a conflict will substantially relieve the suffering caused by war and speed the humanitarian, environmental, and economic recovery of the societies involved.

This article will show that international humanitarian law provides a framework that mandates the inclusion of some provisions and limits the range of negotiation on other terms of cease-fire agreements. These humanitarian provisions are based on legal

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obligations that are designed to alleviate the consequences of war and promote peace. The current legal justification and scope of these provisions will be examined in a generic context which applies to all agreements concluding hostilities, regardless of the political objectives or issues involved in the conflict.

Cease-fire agreements may address a wide range of topics. This article takes a different approach to cease-fire agreements by using two determinants for whether a provision must be included in the document. First, the obligation must be sufficiently defined by international humanitarian law to constitute a legal duty of the parties to act in a certain fashion. Second, there is an issue of timing. By definition, cease-fire agreements conclude hostilities. If there is a legal obligation that specifically arises at the conclusion of hostilities, i.e. repatriation of prisoners of war (POWs), or there is a continual obligation or other legal duty that has a substantially greater chance of being successfully performed if action is taken immediately after the fighting ceases, i.e., searching for missing persons or marking and removing minefields, then it must be included in the cease-fire agreement. Those issues that are politically charged or are not defined by a legal standard that clearly resolves the issue, such as war reparations, may await the peace treaty or political resolution of the conflict.[1]

This article begins with a general outline of the cease-fire process. This section argues that cease-fire agreements are no longer a purely domestic matter between the state parties. It also describes the different types of agreements, both imposed and voluntarily agreed on, and outlines the basic terms to be included in them. The description of the recent cease-fire in the 1991 Gulf War is provided as an example of recent state practice and as a frame of reference for the discussion of humanitarian provisions.

The second part of this article will take an evolutionary approach to a number of different cease-fire topics. The first section is devoted to cease-fire provisions relating to victims of war. It begins with the repatriation of prisoners of war, a well-established area that has undergone substantial development before reaching its current form. Provisions relating to civilians also are included in this section along with obligations to search for, identify and recover the missing and dead, both combatants and civilians. The next section deals with the remnants of war and legal protections relating to

[1]This article uses the term political provision to describe those issues that are not sufficiently defined by international law to the point that they are required to be included in the cease-fire agreement, or remain susceptible to extensive negotiation that could delay the cease-fire process. However, if the parties have negotiated a resolution to these issues, they may be included in the cease-fire agreement.

the removal of unexploded ordnance, sea and land mines, and concludes with a discussion of issues regarding environmental damage caused by war. A third section will briefly discuss the law protecting private and cultural property. Each of these topics will be analyzed to determine the existing state of the law and the basis for including each subject in a cease-fire agreement.

A. *Interest of the World in Promoting International Peace and Security*

Wars are no longer fought in a vacuum. With a global economy, even small regional conflicts can have an impact on the world's economic markets. More importantly, they can trigger a larger war, a mass exodus of refugees, or otherwise threaten international peace and security. Improvements in technology and the widespread sale of arms have increased the military and destructive capability of armed forces throughout the world. In an effort to curb violence and control conflicts, the United Nations has taken an increasingly active role in peace-keeping and peace-enforcement missions. These operations are conducted at great cost—both financially and in lives lost—and to be beneficial, they must end in a peace that will satisfy the domestic interests of the parties to the conflict and the desire of the world community for a lasting peace.

An effective peace is one that each government can live with and continue to receive the political support of its people. Governments often have difficulty in concluding agreements that will receive majority support because the war, and the resolution of issues raised in the peace process, are emotional events that will affect their societies for generations. Although both sides will consider various political terms disagreeable, properly including humanitarian provisions can soften the effect of controversial provisions and provide the basis for positive support for the agreement.

In its role as the guardian of international peace and security, the United Nations has a responsibility to focus on the peace process at the conclusion of every conflict to ensure that this process does not sow the seeds of future conflicts.[2] In its statement of purposes and principles, the United Nations Charter (Charter) specifi-

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[2] U.N. CHARTER art. 1, para. 1, states that one of the purposes of the United Nations is:

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of peace.

cally provides that the United Nations is "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations"[3] This creates an obligation of the United Nations to ensure that all settlements are concluded according to international law; the negotiation of peace is no longer a private matter left to the discretion of the adversaries. It is a process that is conducted under the scrutiny of world public opinion and, to comply with the standards of international law, cease-fire agreements must include certain humanitarian provisions.

Members of the United Nations must act in good faith to fulfill their obligations under the Charter and settle their "international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."[4] This places an additional duty on member states to conclude cease-fire agreements in accordance with international law. The United Nations also has an obligation to "ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."[5]

It also is in the best interest of states to act in accordance with the standards of conduct that are generally accepted by the community of nations. This is particularly true of nations who recently have been involved in an armed conflict and want to be viewed favorably by the world community. The proper use of humanitarian provisions in cease-fire agreements is one of the easiest ways for a nation to demonstrate its desire to comply with international standards and pursue an expeditious recovery and lasting peace.

B. Types of Agreements Concluding Hostilities

The importance of an agreement in concluding hostilities cannot be overemphasized. Just because customary international law obligation exists does not always mean that the parties will comply with it. If a treaty is silent on a subject, the majority view is that it is must be construed in accordance with international law.[6] However, if the parties want to clarify their obligations and ensure

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[3] *Id.*

[4] *Id.* art. 2, paras. 2-3.

[5] *Id.* art. 2, para. 6.

[6] The Paquette Habana, 175 U.S. 677 (1900); *but see* United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992).

compliance, they should reach an agreement that complies with international law so that there are no misunderstandings. This is especially true with states that have been former adversaries. Cease-fire agreements also provide a basis for the restoration of trust between the parties that other forms of war termination do not provide.[7]

Because the scope of a cease-fire agreement is limited only by the minimum protection established by international law and the parties' ability to agree, the parties may agree to provide additional protection for certain people or accept additional responsibility for damages beyond that required by international law. The cease-fire agreement also contains the mechanics of carrying out the parties international law obligations and is much more likely to lead to the actual implementation of these legal obligations.

All of the different agreements involved in the conclusion of hostilities have a long history and well-defined situations for their use. Traditionally, the peace treaty provided a political settlement and formally concluded the war. Capitulations[8] and armistice or

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[7] War termination may take a variety of forms. A small war may be absorbed into a larger one, which in reality is an escalation, and may completely redefine the conflict rather than conclude it. It may end when one party is incapable of continuing to fight either by "extermination" of an organized fighting force or "expulsion" of the force from the theater of hostilities. It may end without agreement through the withdrawal of a party or according to an agreement between the parties. Agreements may be the result of a third party, such as an international organization, working out terms that are agreeable to the parties or they may be imposed by one party on the other in the form **of** a capitulation. These agreements also may be peace treaties negotiated either during hostilities or after an armistice or cease-fire agreement. Finally, as with any generalization, a particular conflict may provide a number of combinations or variations that do not fit in a given category. PAUL R. PILLAR. NEGOTIATING PEACE WAR TERMINATION AS A BARGAINING PROCESS 12-15 (1983).

[8] Capitulation has been defined as "an agreement entered into between commanders of belligerent forces for the surrender of a body of troops, a fortress. or other defended locality, or of a district of the theater of operations" and are normally imposed by one side on the other. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 470 (1956) [hereinafter FM 27-10]. Capitulations should be in writing and, depending on the circumstances of the surrender, should address the following subjects: (1) force or territory surrendered; (2) disposition of enemy forces; (3) if territory is surrendered, provisions relating to the withdrawal of forces and transfer of possession to the victors; (4) disposition of medical personnel and the wounded and sick; (5) disposition of POWs, interned civilians, and other detained persons; (6) disarmament; (7) provisions prohibiting the destruction of property; (8) the provision of facilities and information about minefields and other defense measures; (9) provisions for the civil administration of the area; and (10) that the orders of the victor will be followed. **A** violation of the terms of a capitulation is punishable as a war crime. *Id.* para. 475. **A** capitulation differs from an unconditional surrender which does not involve an exchange of promises. DEP'T OF ARMY, PAMPHLET 27-161-2, INTERNATIONAL LAW, VOL. II, 191 (1962). In either case, the commander is only authorized to surrender the forces and territory under his command. FM 27-10, *supra* para. 472. Accordingly, without governmental authorization, a capitulation by a military commander does not bind a government and may not include political terms or terms that extend beyond the conclusion of hostilities. *Id.*

cease-fires[9] were agreements concluded with military participation and designed to be binding until a formal peace treaty came into force. However, some of these agreements have lost their popularity and are used in different ways or have been replaced by other instruments.

An example of the evolution of these agreements is the reduced popularity of capitulations in international armed conflicts.[10] States are more likely to enter into wars, not for profit, but for ideological reasons, using limited force to achieve limited goals. This type of situation promotes negotiated compromise prior to capitulation.[11] Furthermore, some governments may believe that to retain power and save face, they need to remain in a war until a settlement can be negotiated in spite of a military situation that otherwise might have prompted a capitulation.[12]

Additionally, there has been a notable decline in the number of peace treaties concluded after the parties have entered into a cease-fire agreement.[13] This decline has been attributed to improved communications that allows the leaders of a state to maintain close

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[9]An armistice, truce, or what is now commonly referred to as a cease-fire agreement, is not a peace settlement but, "the cessation of active hostilities for a period agreed upon by the belligerents." FM 27-10, supra note 8, para. 479. Article 37 of the Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 75 U.N.T.S. 287 [hereinafter 1907 Hague Regulations], reprinted in DOCUMENTS ON THE LAWS OF WAR 48 (Adam Roberts & Richard Guelff eds., 2d ed. 1989). "An armistice may be general or local. The first suspends the military operations of the belligerent States everywhere; the second only between certain fractions of the belligerent armies and within a fixed radius." 1907 Hague Regulations, supra art. 36. Additionally, "[i]f its duration is not defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice." Id. This article uses the modern term of cease-fire agreement in place of the word armistice. As used here, cease-fire agreement does not refer to a temporary or limited suspension of hostilities but denotes a general cessation of all military operations of the combatants.

[10]PILLAR, supra note 7, at 28-30. This is true of international armed conflicts, but some wars are less likely to result in a negotiated settlement without extensive international intervention. Civil wars by nature are conflicts between parties who see their opponents as traitors that they could not live with under a negotiated peace. Accordingly, civil wars are more likely to end in extermination, expulsion, or capitulation than a freely negotiated settlement. Extra-systemic wars, which are conflicts between an imperial state and a rebellious colonial power which does not meet the traditional definition of a state, also are less likely to be resolved through negotiation because the imperial power is less likely to compromise. Id. at 16-26.

[11]*Id.*

[12]*Id.*

[13]One study found that of 38 peace settlements between 1922 and 1982, only five were negotiated after an armistice and these were "complicated or special cases." PILLAR, supra note 7, at 31-32.

coordination over the military forces and the negotiators.[14] Improved communications also make it practical for them to conclude negotiations on a number of issues prior to a cease-fire. If the majority of the issues are resolved prior to the end of hostilities and included in the cease-fire agreement, it is less likely that a peace treaty ever will be concluded.

Agreements ending hostilities no longer can be neatly categorized as armistice agreements, capitulations, or peace treaties. The original purposes of these agreements have been combined and the cease-fire agreement used to end modern wars may contain a number of provisions or conditions common to each of these agreements. Consequently, cease-fire agreements are more important than ever and that they include humanitarian provisions is critical. Resolving these issues cannot be delayed in the belief that they may be included in a peace treaty or other subsequent agreement.

The crucial distinction is not in the name of the document, but whether it is truly a voluntary agreement or simply terms imposed on a party with a significant disadvantage in the negotiation process. Admittedly, one party is almost always going to be in a position where they must accept terms to end the hostilities that they would not have chosen if they were able to continue fighting or if they were in a better bargaining position. However, for those areas in which the rule of law provides a clearly defined standard, the bargaining position of the parties should be immaterial; the law controls. The scope of their negotiation is limited by the law, and their negotiations must be conducted within those limits.

C. Terms to be Covered in Cease-Fire Agreements

By definition, cease-fire agreements are designed primarily to conclude active hostilities; they are not intended to replace peace treaties or resolve every political issue. However, because armistice or cease-fire agreements no longer can be negotiated with the understanding that a peace treaty will follow, the nature of these agreements has changed. Although some political questions may be beyond their realm in certain situations, modern cease-fire agreements must address both military and humanitarian issues.

It has been stated that:

> there is no fixed rule or custom which prescribes what provisions should or should not be included in the

[14] *Id.* at **35.**

> armistice agreement. On the other hand, there are certain provisions which . . . are very generally included by the parties, not because of any legal compulsion, but rather because experience has proven that such provisions are of a nature to facilitate the purpose of the armistice and to insure against violations thereof.[15]

These practical or general provisions relate to the specifics of the termination of hostilities and include the precise date and hour of the commencement of the armistice, duration of the armistice, the designation of areas under the control of the each party and any neutral zones, the relations between opposing forces and local inhabitants, acts to be prohibited during the armistice, and any consultative machinery established to supervise the implementation of the agreement.[16]

Cease-fire agreements may contain political and economic terms along with military provisions.[17] The scope of these stipulations is determined by the ability of the parties to agree on them. Some of the general provisions in the cease-fire agreement may overlap with political issues that have not been resolved. For example, cease-fire demarcation lines and neutral zones are closely related and easily confused with political questions of territorial sovereignty. Demarcation lines and neutral zones are intended to separate the military forces to prevent incidents that may lead to an inadvertent resumption of hostilities.[18] As such, they are usually temporary in nature and are not intended to resolve the political issue of territorial boundaries. If it is not intended to address or resolve a territorial dispute, the cease-fire agreement should specifically state the purpose of the demarcation line and exclude any intent to claim territory based on this line.[19] If the parties have not

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[15]Howard S. Levie, *The Nature and Scope of the Armistice Agreement,* 50 AM. J. INT'L L. 880,882 (1956).

[16]FM 27-10, *supra* note 8, para. 487.

[17]Levie, *supra* note 15, at 901. Among the political and military provisions that may be included in a cease-fire are: the evacuation of territory; disposition of aircraft and shipping; cooperation in the punishment of war crimes; restitution of captured or looted property; communications facilities and public utilities; civil administration; displaced persons; and the dissolution of organizations which may subvert public order. FM 27-10, *supra* note 8, para. 488.

[18]Levie, *supra* note 15, at 893.

[19]An example of this type of provision is found in the 1949 General Armistice Agreement between Israel and Egypt, Feb. 24, 1949, 42 U.N.T.S. 251, *reprinted in* THE ARAB-ISRAELI CONFLICT 3: DOCUMENTS 380, 383 (John N. Moore ed., 1974) in which the parties specifically stated in Article V that:

> 2. The Armistice Demarcation Line is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to rights, claims and positions of either Party to the Armistice as regards the ultimate settlement of the Palestine question.

reached an agreement on the issue of territory, they may decide to conclude an agreement on other cease-fire matters and reserve this issue for peaceful negotiations at a later date. Other politically charged issues—such as disarmament and war reparations—may not be resolved at the conclusion of hostilities, and in all likelihood, will only be found in an agreement where a victor is dictating terms to the vanquished.[20]

As an instrument signalling the end of a conflict, the cease-fire agreement must include provisions that address all of the obligations under customary international law that arise immediately on the conclusion of active hostilities. In the past, cease-fire agreements have focused on the mechanics of the suspension of hostilities and, with the exception of the repatriation of POWs, most of these agreements have neglected other humanitarian issues. Those topics that have been addressed have not always been handled in accordance with international law. Following some wars, POWs have been forcibly repatriated in spite of their rights under customary international law to refuse repatriation. There are a number of humanitarian obligations provided for in international treaties that are accepted as customary international law. In addition to the release and repatriation of POWs, these obligations include: duties of the parties toward evacuated, displaced, and interned civilians; the respective duties of military and civilian authorities to account for missing and dead combatants and civilians; the requirement of the parties to report the location of landmines; and to return or provide restitution for damage or removal of protected property. If customary international law provides a clearly defined duty that either arises at the end of the conflict or is a continual duty—such as the obligation to account for the missing and dead or to cooperate in the prosecution of war crimes—it must be included in the cease-fire agreement. On the other hand, any political question that cannot be resolved without delaying the conclusion of the war, should not be included.

Provisions in cease-fire agreements may cover a myriad of topics. General terms dealing with the practical aspects of the cease-fire clearly must be included. Political terms, such as war reparations and territorial disputes, provide the most controversy and may need to be settled in another political forum. In between lies a range of humanitarian terms that have not been included in most agreements but have a strong basis of support in customary international law that limits debate on some issues and mandates inclusion on

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3. The basic purpose of the Armistice Demarcation Line is to delineate the line beyond which the armed forces of the Parties shall not move . . . .

[20]Levie, *supra* note 15, at 901.

others. This article will prove that these duties are not political or subject to negotiation but are either established or emerging legal obligations that should be provided for in every cease-fire agreement. **A** failure to address these important considerations may jeopardize the peace process.

D. Factors Influencing the Negotiation Process

Cease-fire agreements are complex instruments that reflect the competing interests of the state parties to the conflict, rights of individual victims of war, rights of families and concerns of future generations. However, with the exception of international organizations in certain cases, only states are represented at the conference table and it is up to their government and military negotiators to properly represent all of these rights within the bounds of international law.

The negotiation of any cease-fire agreement is a situation-dependent process based on the circumstances surrounding the conflict. It is a complex transaction that is beyond the scope of this article. There are, however, a number of political, military or practical considerations that influence the negotiation process and deserve to be mentioned.

States are usually not dealing with each other as sovereign equals but as adversaries with dramatically different bargaining positions. Because they are at war, the presumption of good faith in negotiations may not always apply.

The timing of a cease-fire can present another problem. The decision of whether to conclude a preliminary cease-fire with additional negotiations later requires an agreement by both parties.[21] The party with a decided military advantage may be reluctant to open or continue negotiations and may prefer to continue fighting to improve its bargaining position or to force a capitulation. This also improves the probability that most political and military issues will be resolved by negotiation prior to the conclusion of a cease-fire agreement.

If the cease-fire agreement is to address political and military issues, both government and military negotiators may be involved. The military negotiators usually will resolve practical issues such as the timing, duration, delimitation of areas controlled by the parties, and the location of landmines. Controversial political issues

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[21] PILLAR, ***supra* note 7, at** *88.*

usually are reserved for government representatives, who may be military commanders authorized to negotiate on behalf of their government. Negotiations may be conducted by either military or government representatives, but the best approach would be a combined military and diplomatic negotiation team.[22]

The number of political, cultural, religious, ethnic, racial, economic, or territorial issues that are either at the root of the conflict or arise during the war are infinite. However, the scope of negotiation on these issues is not unlimited. International law tends to depoliticize some issues and provide a framework for their resolution. For example, the rights to democracy and self-determination may influence negotiations on all of these issues. The law of state responsibility defines negotiations on the economic issues of reparations and the allocation of damages. Disfavor with conquest as a legal method of acquiring territory and the right of self-determination also may limit the scope of negotiation between the government representatives. Most of these largely political issues are left to the bargaining position of the states and to the skills of their negotiators.

On the other hand, international law provides a much more clear picture of the parties' obligations regarding humanitarian provisions in cease-fire agreements. Because these provisions do not present the controversy of most political issues, military negotiators should ensure that these terms are included and the requirements of international law are satisfied.

The effort to ensure that humanitarian provisions are properly drafted and inserted cannot wait until the beginning of the cease-fire negotiations. During the course of a conflict, the focus of the military will be on the destruction of enemy forces. They may not have the luxury of devoting a large number of people to plan for the end of the war. Although each conflict will have its own unique issues, generic plans for the conclusion of hostilities should be prepared as soon as possible with detailed plans and provisions drafted as the issues arise.

International law not only governs the commencement and conduct of hostilities, it also applies to the conclusion. Accordingly, the parties to armed conflicts must place the same priority on plans for the conclusion of hostilities as they put on contingency plans for the commencement and conduct of war. This preparation will ensure that a cease-fire agreement that complies with international law is successfully negotiated and the people of both sides receive the protection that they deserve.

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[22]Levie, *supra* note 15, at 883-84

E. The 1991 Gulf War Cease-Fire

A discussion of the circumstances leading to the conclusion of the 1991 Persian Gulf War provides an example of the evolution of the cease-fire process. This agreement was not one document, but composed of a series of United Nations Security Council Resolutions and Iraqi correspondence along with a meeting between the military commanders to settle the military considerations of the cease-fire. Although it does not fit the traditional view of a negotiated peace process composed of an armistice followed by a peace treaty, it is representative of negotiations being conducted and state practice being established through a number of different documents, events, and diplomatic correspondence. It also illustrates the type of terms to be dealt with immediately following the conclusion of hostilities and the political issues and details that may be delayed until a more formal peace can be arranged.

The cease-fire process in the Gulf War is important for a number of other reasons. The actions of the Security Council under Chapter VII of the United Nations Charter were intended to create binding obligations on the international community with respect to this particular threat to international peace and security. As evidence of state practice, these actions were expressly agreed on by a majority of the members of the Security Council and by their actions in support of them, by members of the coalition forces. It also is the most recent cease-fire process conducted on the world stage. Accordingly, it provides a starting point and example for the analysis of the current international obligations that arise at the end of hostilities.

At eight o'clock on February 28, 1991, after a one hundred-hour ground campaign, coalition forces ceased offensive operations against the Iraqi military.[23] This was not an agreed on cease-fire, but a unilateral decision to temporarily suspend offensive operations.[24] In a letter dated February 27, 1991, the Deputy Prime Minister of Iraq notified the United Nations Security Council that Iraq had started to withdraw its forces from Kuwait and that the "Iraqi Government agrees to comply with resolutions 662 (1990) and 674 (1990) if the Security Council adopts a resolution providing for an immediate cease-fire and cessation of all military operations on land, at sea and in the air.[25] It also stated that Iraq was ready to

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[23]NORMAN H. SCHWARZKOPF & PETER PETRE, GENERAL NORMAN H. SCHWARZKOPF: THE AUTOBIOGRAPHY: IT DOESN'T TAKE A HERO 471 (1992). For a general discussion of each party's adherence to the law of war in the 1991 Gulf War, *see* James P. Terry, *Operation Desert Storm: Stark Contrasts in Compliance with the Rule of Law,* 41 NAVAL L. REV. 83 (1993).

[24]*Id.* at 476.

[25]S.C. Res. 686, 2978th mtg., U.N. Doc. S/22273 (1991).

"release all prisoners of war immediately after the cease-fire and return them to their home countries within a very short period of time."[26] On February 28, 1991, the Deputy Minister of Iraq provided another letter to the President of the Security Council to offcially inform him "that the Government of Iraq agrees to comply fully with Security Council resolution 660 (1990) and all the other Security Council resolutions."[27] In response, the Security Council adopted Resolution 686 on March 2, 1991.28

Resolution 686 covered the initial terms for immediate agreement or items that normally would be discussed in an armistice. It is more than the Security Council dictating terms to Iraq, it is an acceptance of Iraq's offer to comply with all Security Council Resolutions in exchange for an immediate cease-fire.

In Resolution 686, the Security Council, acting under Chapter VII of the United Nations Charter, required Iraq, among other things, to accept the Security Council's previous resolutions and:

> (a) Rescind immediately its actions purporting to annex Kuwait;
>
> (b) Accept in principle its liability under international law for any loss or damage, or any injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq;
>
> (c) Immediately release under the auspices of the International Committee of the Red Cross, Red Cross Societies, or Red Crescent Societies, all Kuwaiti and third country nationals detained by Iraq and return the remains of any deceased Kuwaiti and third country nationals so detained; and
>
> (d) Immediately begin to return all Kuwaiti property seized by Iraq, to be completed in the shortest possible period;
>
> **3.** *Further demands* that Iraq:
>
> (a) Cease hostile or provocative actions by its forces against all Member States, including missile attacks and flights of combat aircraft;

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[26] *Id.*

[27] S.C. Res. 686, 2978th mtg., U.N. Doc. S/22275 (1991).

[28] United Nations Security Council Resolution 686 (Mar. 2, 1991) [hereinafter U.N. Doc. S/RES/686 (1991)], ***reprinted in*** JOHN N. MOORE, CRISIS IN THE GULF 421 (1992)[hereinafter CRISIS IN THE GULF].

(b) Designate military commanders to meet with counterparts from the forces of Kuwait and the Member States cooperating with Kuwait pursuant to resolution 678 (1990) to arrange for the military aspects of a cessation of hostilities at the earliest possible time;

(c) Arrange for immediate access to and release of all prisoners of war under the auspices of the International Committee of the Red Cross and return the remains of any deceased personnel of the forces of Kuwait and the Member States cooperating with Kuwait pursuant to resolution 678 (1990); and

(d) Provide all information and assistance in identifying Iraqi mines, booby traps and other explosives as well as any chemical and biological weapons and material in Kuwait, in areas of Iraq where forces of Member States cooperating with Kuwait pursuant to resolution 678 (1990) are present temporarily, and in adjacent waters;[29]

This resolution also welcomed the "decision of [the Coalition Forces] to provide access and to commence immediately the release of Iraqi prisoners of war as required by the terms of the Third Geneva Convention of 1949, under the auspices of the International Committee of the Red Cross."[30]

Resolution 686 serves the purpose of a traditional armistice by resolving a number of issues "immediately" at the conclusion of hostilities. It also lays the groundwork for the settlement of political issues usually determined in a peace treaty. One of the most controversial issues for Iraq was the question of territorial boundaries. This resolution only required Iraq to rescind its attempts to annex Kuwait. It did not mention the boundary dispute between Iraq and Kuwait. It also did not provide a detailed discussion of state responsibility or war reparations, but did contain a boilerplate provision in which Iraq was to "accept in principle its liability."[31] Additionally, by requiring Iraq to "implement its acceptance of all twelve resolutions noted above" this resolution incorporated a number of other terms into the cease-fire.[32] This included the terms of Security Council

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[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* The twelve Security Council Resolutions incorporated by reference are: **U.N.** Doc. S/RES/660 (1990); **U.N.** Doc. S/RES/661 (1990); **U.N.** Doc. S/RES/662 (1990); **U.N.** Doc. S/RES/664 (1990); **U.N.** Doc. S/RES/665 (1990); **U.N.** Doc. S/RES/666 (1990); **U.N.** Doc. S/RES/667 (1990); **U.N.** Doc. S/RES/669 (1990); **U.N.** Doc. S/RES/670 (1990); **U.N.** Doc. S/RES/674 (1990); **U.N.** Doc. S/RES/677 (1990); and **U.N.** Doc. S/RES/678 (1990). These resolutions are reprinted in MOORE, ***supra*** note 28, at 403-20.

Resolutions 670 (September **25,** 1990) and 674 (October 29, 1990), which contained liability for war crimes by reaffirming in part that the "Fourth Geneva Convention applies to Kuwait and that as a High Contracting Party to the Convention Iraq is bound to comply fully with all its terms and in particular is liable under the Convention in respect of the grave breaches committed by it, as are the individuals who commit or order the commission of grave breaches . . . ."[33] The Security Council confirmed the role of Resolution 686 as an informal cease-fire document, as opposed to a conclusive peace, in its final paragraph by deciding "that in order to secure the rapid establishment of a definitive end to the hostilities, the Security Council remains actively seized of the matter."[34]

Another step in the conclusion of the war was the meeting between the military commanders at Safwan, Iraq, on March **3,** 1991.[35] The purpose of this meeting was to discuss the military conditions for a cease-fire.[36] At this meeting, General Schwarzkopf and Lieutenant General Prince Khalid Bin Sultan al-Saud represented the United States and the Kingdom of Saudi-Arabia respectively; and Lieutenant General Sultan Hashim Ahmad was in charge of the Iraqi representatives.37 General Schwarzkopf's overriding concern in drafting his terms of reference for the meeting was to take care of the troops and make the battlefield safe.[38] Accordingly, these terms included: the immediate release of POWs; identification of coalition forces missing in action; the return of bodily remains; the disclosure of minefields and unconventional weapons bunkers in Kuwait; and a demarcation line.[39] The only point that needed clarification was the demarcation line. General Ahmad did not have authority to concede territory and was very concerned about the purpose of this line.[40] General Schwarzkopf assured him that the line had "nothing to do with borders. It is only a safety measure. We have no intention of leaving our forces permanently in Iraqi territory once the cease-fire is signed."[41] The discussion also included requirements for vehicles in the cease-fire zone to fly orange flags to signal peaceful intent and permission for Iraq to fly helicopters over the territory of

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[33]*See* U.N. Doc. S/RES/670 (1990); U.N. Doc. S/RES/674 (1990).

[34]U.N. Doc. S/RES/686 (1991).

[35]SCHWARZKOPF, *supra* note 23, at 473-91. This also was provided for in U.N. Doc. S/RES/686, para. 3(c) (1990).

[36]This was a discussion and not a negotiation. The United States Department of State took the position that only the State Department was allowed to negotiate for the United States. SCHWARZKOPF, *supra* note 23, at 480.

[37]*Id.* at 479-80.

[38]*Id.*

[39]*Id.* at 484-89.

[40]*Id.* at 488.

[41]*Id.*

Iraq on the Iraqi side of the demarcation line.[42] Iraqi fighters and bombers were grounded.[43]

In addition to these terms, Lieutenant General Khalid wanted the return of Kuwaiti citizens taken against their will and assurances that Iraq would never invade the Kingdom of Saudi Arabia.[44] Lieutenant General Ahmed stated that no one had been taken by force but anyone who had come to Iraq after the invasion would be allowed to leave.[45]

One month later, on April 3, 1991, the Security Council adopted Resolution 687 by a vote of twelve to one with two abstentions.46 Resolution 687 served as the final settlement to the 1991 Persian Gulf War and included: detailed provisions concerning the controversial issues of the reestablishment of the territorial boundary between Iraq and Kuwait; establishment of a demilitarized zone with United Nations observers; disarmament; and continuation of the arms embargo. It also contained additional provisions detailing the return of Kuwaiti property and Iraq's liability for damages caused by the war.[47] Additionally, Resolution 687 included a provision that granted the International Committee of the Red Cross (ICRC) access to Iraq to search for Kuwaiti and third-country nationals requesting repatriation and required Iraq to cooperate with the ICRC's efforts, provide lists of these people, and repatriate them or their remains.[48] It also required Iraq not to commit or support international terrorism.49 The Security Council stated the purpose of Resolution 687 by declaring "that, upon official notification by Iraq to the Secretary-General and to the Security Council of its acceptance of the provisions above, a formal cease-fire is effective between Iraq and Kuwait and the Member States cooperating with Kuwait in accordance with Resolution 678 (1990)."[50] The Iraqi National Assembly accepted the terms of Resolution 687 on April 6, 1991.[51]

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[42] *Id.* at 488-89.

[43] *Id.*

[44] *Id.* at 480-88.

[45] *Id.*

[46] United Nations Security Council Resolution 687 (Apr. 3, 1991) *reprinted in* MOORE, *supra* note 28, at 424 (1992).

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] Iraq's response to Resolution 687 made it clear that Iraq did not readily accept these provisions and that they considered this resolution a threat to Iraq's sovereignty. *Identical letters dated 6 April 1991 from the Minister for Foreign Affairs of the Republic of* ***Iraq*** *addressed respectively to the Secretary-General and the President of the Security Council,* U.N. *Doc.* S/22456 (1991). Iraq's acceptance of Resolution 687 is expressed in U.N. Doc. S/22480 (1991).

Although Resolution 687 was characterized as a "formal cease-fire," it was adopted over one month after the conclusion of the fighting and contains the controversial political issues of war reparations, disarmament, and the determination of territorial boundaries. Parties to a conflict must deal with a number of international law obligations that arise immediately after the conclusion of active hostilities in an agreement similar to Resolution 686. This type of document, whether imposed by an international organization or agreed on by the parties to a conflict, is the subject of this article.

II. Ending Hostilities: Role of the Military and Operational Considerations

A. *Rules of Engagement*

Cease-fire agreements require the military to revise other areas of their operations to fit the terms of the cease-fire. Any discussion of the obligations of parties at the conclusion of hostilities would be incomplete without mentioning rules of engagement (ROE). For the United States Armed Forces, ROE are defined as "directives issued by competent military authority which delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered."[52] During the course of the war, the military will be operating under wartime ROE that reflect the responsibility of the forces "to seek out, engage, and destroy enemy forces consistent with national objectives, strategy, and the law of armed conflict."[53]

New **ROE,** compatible with the terms of the cease-fire agreement, must be prepared and ready to come into effect simultaneously with the effective time of the agreement.[54] These **ROE** must include provisions for the enforcement of any no fire or no fly zones along with any other restrictions on the deployment of personnel or weapons. Rules of engagement must be distributed to all units at the same time as the cease-fire agreement because continued hostile acts under wartime **ROE** may be considered serious violations of

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[52] JOINT CHIEFS OF STAFF, JOINT PUB 1-02, DEP'T OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 329 (Mar. 23, 1994).

[53] OFFICE OF THE JUDGE ADVOCATE GENERAL, DEP'T OF **NAVY,** ANNOTATED SUPP. TO THE COMMANDER'S HANDBOOK OF THE LAW OF NAVAL OPERATION para. 5.5 (1989).

[54] W. Hays Parks, *The Gulf War: A Practitioner's View,* 10 DICK. J. INT'L L. 393. at 419 [hereinafter]; *see generally* Guy R. Phillips, *Rules of Engagement: A Primer,* ARMY LAW., July 1993, at 4 (providing an excellent overview of the purposes and analysis behind ROE); W. Hays Parks, *Righting the Rules of Engagement,* U.S. **NAVAL** INST. PROC. 83 (1989) (describing the evolution of United States ROE).

the cease-fire agreement and lead the other party to discard the terms of the agreement and renew hostilities.[55]

Rules of engagement should not restrict the inherent right of self defense of the military forces on either side.[56] Furthermore, any unit properly exercising its right of self defense is not violating the terms of the cease-fire even though the hostile act or intent that triggers the response of self defense may constitute a serious violation.[57]

If new ROE are not properly prepared or distributed in a timely fashion, the cease-fire may be violated before it even has a chance to work. Any serious violation may damage any trust that might have built up during the cease-fire talks and jeopardize the whole peace process by making renewed negotiations difficult.

B. Occupation v. Military Control

The legal obligations of a military force toward the civilian population are based on the characterization of the force. At the conclusion of hostilities, military forces can find themselves assuming a variety of roles, including that of an occupying power. The law of occupation is a subject that has generated a large body of literature and covers almost every aspect of life in occupied territory. If a military force becomes an occupying power, it undertakes a number of other responsibilities under international law that continue beyond the end of hostilities.

An occupying power is a hostile army that establishes, and is capable of exercising, authority over the territory.[58] The authority of the legitimate power must have "in fact passed into the hands of the occupant."[59] It exists in situations where "the invader has rendered

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[55] 1907 Hague Regulations, *supra* note 9, art. 40, states that "Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities."

[56] For a discussion of this right; *see* Phillips, *supra* note 54, at 10-13.

[57] An example of an act of self defense in this context would be the firing of a missile by an aircraft patrolling the cease-fire line at an opposing anti-aircraft battery that illuminates the aircraft with its target acquisition radar demonstrating hostile intent.

[58] 1907 Hague Regulations, *supra* note 9, art. 42, provides: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." *See generally* Adam Roberts, *What Is a Military Occupation?*, 55 BRIT. Y.B. INT'L L. 249 (1985) (providing an extensive discussion of the different types of occupation).

[59] 1907 Hague Regulations, *supra* note 9, art. 43, states that:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

the invaded government incapable of publicly exercising its authority, and that the invader has successfully substituted its own authority for that of the legitimate government in the territory invaded."[60] Although military occupation is a question of fact, and there is no legal requirement to issue a proclamation, the United States policy is to issue a proclamation to notify the population and declare the area occupied.61

Although occupation is normally preceded by an invasion, invasion does not equate to occupation.62 The invader also must take "firm possession of the enemy territory for the purpose of holding it."[63]

If the military force has assumed the role of an occupying power, then the law of occupation applies and requires the occupying power to fulfill the obligations of a provisional government to the civilian population in the occupied territory. Occupation does not amount to subjugation or conquest, which usually involves annexation or other transfer of sovereignty and is normally addressed in the treaty of peace.[64] Occupation is intended to be temporary and ceases either when sovereignty passes or the legitimate government regains effective control and authority over the territory.

Although the responsibilities of an occupying power to care for a civilian population during occupation is beyond this article's scope, the drafters of the cease-fire agreement must determine whether the law of occupation applies and consider any issues that may need to be addressed as a result.

If a military force is merely passing through a territory or intends to withdraw immediately upon completion of hostilities, it is not an occupying power and does not assume the responsibilities of one. This thesis is concerned primarily with the cease-fire activities of this type of force and not the additional obligations of an occupying power or those of a power that is interested in subjugation or annexation of territory.

III. Victims of War

A. *Care for the Civilian Population in the War Zone*

A tremendous amount of law potentially affects the rights of

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[60]FM 27-10, *supra* note 8, para. 355.

[61]*Id.* para. 357.

[62]*Id.* para. **352.**

[63]*Id.*

[64]*Id.* para. 353.

civilians during time of war. International humanitarian law specifically applies during periods of armed conflict and occupation while certain nonderogable provisions of international human rights law also may apply.[65]

The vast majority of the protection for civilians in international humanitarian law is contained in the four Geneva Conventions of the **1949** and the **1977** Protocols.66 With the exception of common article **3,** which provides some minimum protection for "armed conflicts not of an international character,'' the **1949** Geneva Conventions only apply to international armed conflicts. As a general rule, these conventions do not impose obligations on a state party to protect their own nationals. Each of the conventions provide some protection for civilians but vary in scope. The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GWS), the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea (GWS (Sea)), and the Geneva Convention Relative to the Treatment of Prisoners of War (GPW) may apply to certain civilians who accompany the armed forces or members of the merchant marine and crews of civil aircraft.67 If so, these civilians are entitled to the additional protection conferred on prisoners of war and wounded, sick, and ship-

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[65]THOMAS BURGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL **205-06** (1988).

[66]Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. **12, 1949, 6** U.S.T. **3114,** T.I.A.S. No. **3362, 75** U.N.T.S. **31** *(entered into force* Oct. **21, 1950)** [hereinafter GWS], *reprinted in* ROBERTS & GUELFF, *supra* note **9,** at **171;** Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, *opened for signature* Aug. **12, 1949, 6** U.S.T. **3217,** T.I.A.S. No. **3363, 75** U.N.T.S. **85** *(entered into force* Oct. **21, 1950)** [hereinafter GWS (Sea)] *reprinted in* ROBERTS & GUELFF, *supra* note **9,** at **194;** Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. **12, 1949, 6** U.S.T. **3316,** T.I.A.S. No. **3364, 75** U.N.T.S. **135** *(entered into force* Oct. **21, 1950)** [hereinafter GPW] *reprinted in* ROBERTS & GUELFF, *supra* note **9,** at **216;** Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. **12, 1949, 6** U.S.T. **3516,** T.I.A.S. No. **3365, 75** U.N.T.S. **287** *(entered into force* Oct. **21, 1950)** [hereinafter GC] *reprinted in* ROBERTS & GUELFF, *supra* note **9,** at **272;** Protocol Additional to the Geneva Conventions of **12** August **1949,** and Relating to the Protection of Victims of International Armed Conflicts, Dec. **12, 1977, 1125** U.N.T.S. **3** [hereinafter **1977** Geneva Protocol I], *reprinted in* ROBERTS & GUELFF, *supra* note **9,** at **389.** Protocol Additional to the Geneva Conventions of **12** August **1949,** and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. **12, 1977, 1125** U.N.T.S. **609** [hereinafter **1977** Geneva Protocol II], *reprinted in* ROBERTS & GUELFF, *supra* note **9,** at **449.**

[67]GWS, *supra* note **66,** art. **13;** GWS (Sea), *supra* note **66,** art. **13;** GPW, *supra* note **66,** art. **4.** *See also* **A** *Practitioner's View, supra* note **54,** at **407-09** (discussing the distinction between combatants and civilians and the protection to which civilians are entitled under certain circumstances).

wrecked combatants. However, the majority of the protection for civilians is found in the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC) which protects persons "in the hands of a party to the conflict or occupying power of which they are not nationals."[68] The definition of protected persons also specifically excludes those persons entitled to protection under the first three conventions.69 The GC is divided into different sections with articles that protect civilians generally, others that apply to the entire population of the parties to the conflict, provisions that protect civilians in occupied territory, and others that protect internees.

The GC applies from the outset of any international armed conflict and, in the territory of the parties to the conflict, it continues to apply until the "general close of military operations."[70] This term refers to the "final end of all fighting between all those concerned."[71] However, it does not signal the end of the application of the convention. In occupied territory, the GC applies for one year after conclusion of the conflict, and for some obligations, for the duration of the occupation.72 Another potential loophole is closed by continuing protection for those "persons whose release, repatriation or re-establishment may take place after such dates."[73] This allows continued protection for protected persons who remain interned in the territory of parties to the conflict.[74] These time limits on the application of the convention are extremely important as they affect the duties of the parties that extend beyond the cease-fire agreement.

It is beyond the scope of this article to discuss every obligation that parties to a conflict have to the civilian populations in their areas of control. Although in a cease-fire agreement the parties need to specifically address very few subjects concerning civilians, there are a number that may need to be included based on the situation. Any of the terms in a cease-fire agreement cannot "adversely affect

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[68]GC, *supra* note **66,** art. **4.**

[69]*Id.*

[70]*Id.* art. **6.**

[71]This interpretation also cites the Armistice between France and Germany in 1940 as an example of an agreement that did not signify the general close of military operations. **J.** PICTET, COMMENTARY TO THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR **62** (Geneva ICRC 1958).

[72]GC, *supra* note **66,** art. **6.**

[73]*Id.*

[74]PICTET, *supra* note 71, at **64.**

the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them."[75]

One of the early treaties of humanitarian law contained only one provision specifically relating to civilian issues in cease-fire agreements and provided that the issue of communications between civilians in different states is a subject that must be settled in the armistice.[76] The importance of this type of provision cannot be underestimated and a failure to include it may prevent the populations from returning to a normal life. The Korean Armistice Agreement did not include one of these provisions and, as a result, the civilian populations of North and South Korea have not had normal social or commercial relations for over forty years.[77]

The GC provides a number of other duties for the parties at the end of hostilities. These obligations vary in effect and fall within different parts of the GC. Typically, these issues are not addressed in cease-fire agreements, but are discussed here as issues that should be considered in drafting the agreement. These issues will be divided into four categories: **(1)** obligations that apply to civilians generally at the end of hostilities; **(2)** obligations that apply to protected persons within the territory of parties to the conflict; **(3)** additional duties to protected persons in occupied territory; and **(4)** duties to interned civilians.

Part II of the GC provides general protection for the populations of the parties to the conflict. For the most part, these obligations end at the conclusion of military operations. Accordingly, there is no duty to include provisions that would continue this protection in the cease-fire agreement, unless they relate to the release, repatriation or reestablishment of protected persons.[78] However, the parties may want to consider adding other obligations to the cease-fire agreement if the circumstances warrant. If it appears that a number of families have been separated as a result of the conflict, and there is a reluctance to reestablish normal communications between the former belligerents, it may be necessary to include pro-

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[75] GC, *supra* note 66, art. 7. Article 47 also prevents an occupying power from depriving protected persons of their rights under this Convention. *Id.*

[76] Article 39 of the 1907 Hague Regulations, *supra* note 9, states: "It rests with the contracting Parties to settle, in the terms of the armistice, what communications may be held in the theatre of war with the inhabitants and between the inhabitants of one belligerent State and those of the other."

[77] HOWARD S. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT 916 (1986); *see also* Howard S. Levie, *The Korean Armistice Agreement and Its Aftermath,* **41** NAVAL L. REV. 115 (1993) (describing a number of issues that arose during the Korean Armistice negotiations).

[78] GC, *supra* note 66, art. 6.

visions requiring the parties to "enable" families to correspond and to "facilitate inquiries" by members of dispersed families regarding missing relatives.[79] These rights are similar to the Hague IV obligation to include any provision in the cease-fire agreement that the parties deem necessary regarding communications between the civilian inhabitants in each territory.[80] They also were included in Part II of the GC with the intention that these rights receive the widest application possible and to ensure that they were not just limited to persons in occupied territories.[81]

Part III of the GC governs the status and treatment of protected persons and is divided into four different sections: (1) Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories; (2) Aliens within the Territory of a Party to the Conflict; **(3)** Occupied Territories; and (4) Regulations for the Treatment of Internees.

The section on aliens in the territory of a party specifically provides continued protection for aliens who are not repatriated at the end of the conflict.[82] Article **46** also states, "In so far as they have not been previously withdrawn, restrictive measures taken regarding protected persons shall be cancelled as soon as possible after the close of hostilities."[83] If there are grounds for concern over the welfare of aliens in the territory of one of the parties to a conflict, the other party may want to echo the protections of the GC in a binding provision of the cease-fire agreement. Because the GC does not apply to a party's nationals, in some situations parties may want to include a provision in the agreement for the protection of certain minority groups which may need more assistance than aliens. An example of this type of situation is the United Nations concern for the Kurdish people in Iraq following the 1991 Persian Gulf War.

Because the obligations of an occupying power are myriad and

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[79] Article **25** provides in part that "All persons in the territory to the conflict, or in a territory occupied by it, shall be enabled to give news of a strictly personal nature to members of their families, wherever they may be and receive news from them." *Id.* Article **26** states that:

> Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged on this task provided they are acceptable to it and conform to its security regulations.

Id.

[80] 1907 Hague Regulations, *supra* note 9, art. 39.

[81] GC, *supra* note **66,** arts. **25, 26.**

[82] *Id.* art. 38.

[83] *Id.* art. **46.**

continue beyond the end of the conflict, addressing all of these duties in the cease-fire agreement is unnecessary. If a military force meets the definition of an occupying power and intends to assume those duties, it should issue a proclamation defining the limits of the occupation, but this proclamation does not have to be part of the cease-fire agreement.

The duties of the occupying power that should be addressed include: the obligation of the detaining power to allow collective relief;[84] prohibitions against deportations, transfers, and evacuations;[85] and the duty to turn over detainees at the end of occupation.[86] Collective relief is not optional. "If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all means at its disposal."[87] Collective relief raises the same concerns as the Kurdish example cited above. It only applies to occupied territory and not within the national boundaries of a party to the conflict who has retained control and authority over that territory. If it appears that the occupying power is unable to provide the care necessary for the population under its control, the other parties to the cease-fire agreement or the United Nations should work to include a provision allowing collective relief. Occupation does not equal sovereignty, therefore, these relief efforts cannot be prevented based on an argument that they infringe on the occupying power's sovereignty.

The GC also prohibits occupying powers from conducting "individual or mass forcible transfers" from the occupied territory or any other territory "regardless of their motive."[88] However, an occupying power may evacuate the population from a given area "if the security of the population or imperative military reasons so demand."[89] This is a strict condition precedent that limits evacuations to situations where it is absolutely essential. Because the war is over at the time of the cease-fire, evacuations should be unnecessary.

The GC also requires that "[plersons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased."[90] Unfortunately, this provision arguably requires the mandatory transfer of these displaced persons back to

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[84] *Id.* art. 59.
[85] *Id.* art. 49.
[86] *Id.* art. 77.
[87] *Id.* art. 59.
[88] *Id.* art. 49.
[89] *Id.*
[90] *Id.*

the area from which they were evacuated. Like issues of forced versus voluntary repatriation of POWs, individual evacuees should be free to choose whether they want to be transferred home.[91]

Evacuees by definition are not detained persons, but only moved out of an area for their own safety or imperative military reasons. As such, they have a legal right to return to their homes at the conclusion of hostilities and the occupying power who evacuated them has a duty to transfer them back to their homes. The return of evacuees is of particular importance because it still may be an issue during the negotiation of the cease-fire agreement. Accordingly, the cease-fire agreement should contain a provision allowing the voluntary transfer of these displaced persons home.[92]

There also are a number of obligations regarding interned civilians.[93] The regulations for civilian internees generally parallel the provisions concerning the treatment of POWs.[94] The GC states that "[i]nternment shall cease as soon as possible after the close of hostilities."[95] However, an exception allows the detaining power the discretion to continue to detain internees who have been accused or convicted at disciplinary proceedings.96 The requirement to release internees should be read with Article **134** of the GC which provides that the parties "shall endeavor, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation."[97] This provision is designed to return internees to the position that they would have been in, had they not been interned. Returning the internees to their last residence or repatriating them may not provide all of the

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[91] *See* infra text accompanying notes 133-157.

[92] This issue was the subject of further negotiation (with a time limit) in Article 8(c) of the Agreement on Ending the War and Restoring Peace in Viet-Nam, Jan 27, 1973, 24 U.S.T. 1, T.I.A.S. 7542 [hereinafter 1973 Vietnam Agreement] which provided:

> The question of the return of Vietnamese civilian personnel captured and detained in South Viet-Nam will be resolved by the two South Vietnamese parties on the basis of the principles of Article 21 (b) of the Agreement on the Cessation of Hostilities in Vietnam of July *20* 1954. The two South Vietnamese parties will do so in a spirit of national reconciliation and concord, with a view to ending hatred and enmity, in order to ease suffering and reunite families. The two South Vietnamese parties will do their utmost to resolve this question within ninety days after the cease-fire comes into effect.

[93] The majority of the Geneva Convention, section IV of Part III, is devoted to the treatment of internees. ***See*** GC, ***supra*** note 66, arts. 79-135.

[94] J. PICTET, COMMENTARY TO THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 370 (Geneva ICRC 1958).

[95] GC, *supra* note 66, art. 133.

[96] *Id.*

[97] *Id.* art. 134.

necessary humanitarian assistance, especially in situations where their homes have been destroyed.98 Although these are the only options that customary international law provides, if the situation warrants, the cease-fire agreement may provide additional protection.

The detaining power also is responsible for the costs of returning internees to their last place of residence or repatriation in certain circumstances.99 Any provision regarding these costs in a cease-fire agreement should incorporate the terms of article **135** of the GC by reference.

The duty to turn over detained persons at the close of occupation does not impose a duty to release detainees at the conclusion of hostilities.100 However, the parties may want to provide that all detainees are to be turned over at the end of hostilities, especially if the offenses which they have been accused or convicted of are political.

The Agreement on Ending the War and Restoring Peace in Vietnam made it clear that release and return of Vietnamese civilian personnel held in South Vietnam was a separate issue from the repatriation of POWs.101 A Protocol to the Vietnam Agreement adopted the definition used in article 21 (b) of the Agreement on the Cessation of Hostilities in Vietnam of July 20, **1954** and defined the

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98J. PICTET, COMMENTARY TO THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 517 (Geneva ICRC 1958).

99GC, *supra* note **66,** art. 135, provides that:

> The Detaining Power shall bear the expense of returning released internees to the places where they were residing when interned, or, if it took them into custody while they were in transit or on the high seas, the cost of completing their journey or their return to their point of departure.
>
> Where the Detaining Power refuses permission to reside in its territory to a released internee who previously had his permanent domicile therein, such Detaining Power shall pay the cost of the said internee's repatriation. If, however, the internee elects to return to his country on his own responsibility or in obedience to the Government of the Power to which he owes allegiance, the Detaining Power need not pay the expense of his journey beyond the point of his departure from its territory. The Detaining Power need not pay the cost of repatriation of an internee who was interned at his own request.
>
> If internees are transferred in accordance with Article **45,** the transferring and receiving Powers shall agree on the portion of the above costs to be borne by each.
>
> The foregoing shall not prejudice such special agreements as may be concluded between Parties to the conflict concerning the exchange and repatriation of their nationals in enemy hands.

100*Id.* art. 77. Detained persons are "protected persons who have been accused of offenses or convicted by the courts in occupied territory." *Id.*

101Dr. Henry Kissinger, President Nixon's Assistant for National Security Affairs, stated in a Press Conference on January **24,** 1973 that:

term "civilian internees" as "all persons who having in any way contributed to the political and armed struggle between the two parties, have been arrested for that reason and have been kept in detention by either party during the period of hostilities."[102] The release of detained Vietnamese civilians was reserved for future negotiation between the South Vietnamese parties.[103] Failure to resolve this issue in the agreement may have expedited the release of POWs, but no doubt delayed the release of detained civilians.

Resolution 686, stating the terms of the preliminary cease-fire provisions of the 1991 Gulf War, took a different approach and required Iraq to "[i]mmediately release . . . all Kuwaiti and third country nationals detained by Iraq and return the remains of any deceased Kuwaiti and third country nationals so detained."[104] This provision conforms to customary international law by requiring the immediate release of all civilians at the close of hostilities. Although it may be appropriate to include all civilians in a given situation, this deprives the detaining power of the discretion to continue to hold civilians interned as a result of disciplinary proceedings. Even though there may be some technical differences in the legal obligations behind the return of civilians who have been forcibly transferred, evacuated, or interned, cease-fire agreements should require the release and return of civilians in all of these categories.

The 1977 Protocols to the 1949 Geneva Conventions do not include additional topics regarding civilians to be included in cease-fire agreement.[105] However, Protocol I modifies some existing subjects and provides a few additional obligations or considerations. One example is that the responsibilities of the occupying power are extended until the "termination of the occupation" under Article 3(b)

> We insisted throughout that the question of American prisoners of war and of American civilians captured throughout Indochina should be separate from the issue of Vietnamese civilian personnel detained partly because of the enormous difficulty of classifying the Vietnamese civilian personnel by categories of who was detained for criminal activities. And secondly, because it was foreseeable that negotiations about the release of civilian detainees would be complex and difficult and because we did not want to have the issue of American personnel mixed **up** with the issues of civilian personnel in South Vietnam.

Dr. Henry Kissinger, Press Conference in the Executive Conference Room (Jan. **24,** 1973), *in* DOCUMENTATION ON VIET-NAM AGREEMENT, DEP'T OF STATE NEWS RELEASE. Jan. **24,** 1973, at 6.

[102]Article 7 of the Protocol Concerning the Return of Captured Military Personnel and Foreign Civilians and Detained Vietnamese Civilian Personnel, Jan. 27, 1973, 24 U.S.T. **24** [hereinafter 1973 Vietnam Personnel Protocol].

[103]*See supra* note 92.

[104]U.N. Doc. S/RES/686 (1991).

[105]1977 Geneva Protocol I, *supra* note 66; 1977 Geneva Protocol II, *supra* note 66.

of Protocol I instead of the general rule of one year after the close of military operations contained in article 6 of the GC.[106] Other provisions in Protocol I that elaborate on the care for the civilian population include Articles 70 and 71, which provide protection for relief actions and personnel participating in them, and Article 74 which is concerned with the reunion of dispersed families.[107]

Every conflict is different and some of the provisions mentioned above may not be necessary in a particular cease-fire agreement. For example, there may not be an occupying power or a need for collective relief. However, all of these subjects should be considered, and included, if the possibility exists that the civilian populations may benefit from their presence in the agreement.

B. Repatriation of Prisoners of War

The repatriation of POWs has the most extensive state practice of all of the humanitarian issues involved in the conclusion of hostilities, and must be included in any cease-fire agreement. It can be viewed from the perspectives of the states' responsibility to POWs and the individual rights of POWs in international law. A number of factors can affect these rights and duties. The repatriation of POWs has evolved from an extremely political and controversial topic during the Cold War to one that, because of state practice, is no longer subject to serious debate.

The early practice of POW repatriation was based on an exchange of POWs by number and grade. Other issues included reciprocity and mutual repatriation and bans on the transfer of POWs from one state to another ally continuing to fight. However, the most controversial issues have involved the time of repatriation and the issue of forced versus voluntary repatriation. The following sections will discuss the development of the law of POW repatriation, state practice, its effect on the peace bargaining process, and the rights of the individual POW.

The primary concern of states during the peace process is negotiating provisions that are consistent with their own self-interest. For some states, concern for the POW often is secondary. The GPW is designed to protect POWs and ensure that states do not infringe on the rights of these victims of war.

The development of international law protecting POWs has undergone a profound change in the last 200 years. A shift from the

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[106] 1977 Geneva Protocol I, *supra* note 66, art. 3(b).

[107] *Id.* arts. 70, 71, 74.

practice of paying ransom for prisoners or placing a higher value on officers in exchange for a specified number of enlisted prisoners began around the time of the French Revolution.[108] A similar custom, that of exchanging POWs based on number and rank, or man for man, grade for grade, continued into the nineteenth century. However, both of these early customs were flawed because POWs are held, not for punishment, but for "the purpose of preventing the captives from assisting the enemy in the battle and thus bringing an end to the war."[109] Once the war is over, no reason exists to base repatriation on an exchange of an equal number of prisoners. Furthermore, the parties cannot be expected to capture an equal number of prisoners during the conflict. An extreme example is illustrated by the **1991** Gulf War, where the coalition forces captured 86,743 POWs[110] compared to forty-one POWs held by Iraq at the end of the war.[111]

The twentieth century brought increased recognition of individual POW rights. International treaties addressed issues of primary concern to the POWs and their families, such as time of repatriation. Article 20 of the **1907** Hague Regulations stated that "[a]fter the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible."[112] This provision did not mention any conditions on the exchange of prisoners, but only required expeditious repatriation. This omission demonstrates an intent on the part of the international community to repatriate all

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[108]The Decree of 16 September **1792** of the French National Assembly Concerning the Exchange of Prisoners of War, **1** DeClercque **219,** *reprinted in 60* HOWARD S. LEVIE, DOCUMENTS ON PRISONERS OF WAR, INTERNATIONAL LAW STUDIES **13 (1979)** [hereinafter DOCUMENTS]. The National Assembly stated in part:

> Considering that the basis . . . [of] . . . agreements ought to be founded upon the principles of liberty and equality; Decrees as the principle for the exchange of prisoners of war:
>
> **1.** There shall be no monetary table for exchange, according to different grades, except in terms relative to the corresponding grades in the enemy armies.
>
> **2.** There shall be no table of exchange under which an officer or noncommissioned officer, of whatever grade he may be, is to be exchanged against a greater number of individuals of lower grade.
>
> **3.** The common basis for the exchange of prisoners of war, which no modification may alter, shall be to exchange man for man, grade for grade.

Id.

[109]HERBERT C. FOOKS, PRISONERS OF WAR **303** (1924).

[110]UNITED STATES DEP'T OF DEFENSE, CONDUCT OF THE GULF WAR 577 (1992) [hereinafter CONDUCT OF THE GULF WAR].

[111]SCHWARZKOPF, *supra* note **23,** at **489.**

[112]1907 Hague Regulations, *supra* note **9,** art 20.

POWs at the conclusion of hostilities without regard to number or rank. This was the only provision in the Hague Conventions regarding repatriation of POWs, and it only provided for repatriation after the conclusion of the peace.

The 1929 GPW and the 1949 GPW significantly added to the body of law protecting POWs.[113] Each of these treaties was intended to provide improvements to the law based on the experiences of the drafters during the World Wars. Although this article is limited to repatriation at the conclusion of hostilities, both the 1929 GPW and the 1949 GPW provided for repatriation of POWs during hostilities; an important development in the law that warrants a brief discussion because this issue later played an important role in the debate over voluntary repatriation at the end of hostilities.[114] These provisions specifically rejected the exchange of POWs based on number and grade and article 109 of the 1949 GPW gave POWs additional rights by providing that "no sick or injured prisoner of war . . . may be repatriated against his will during hostilities."[115] The agreement for the exchange of sick and wounded POWs in the Korean War (Little Switch)[116] incorporated the terms of article 109 allowing POWs the freedom to choose repatriation during hostilities. Unfortunately, the issue of voluntary versus forced repatriation at the conclusion of hostilities was a major obstacle to the cease-fire process in the Korean War.[117]

Article 109 provides for the transfer of certain classes of sick and wounded POWs to neutral countries.[118] It also states that the belligerents are free to make agreements allowing able-bodied

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[113] The 1949 GPW, *supra* note 66, replaced an earlier version between contracting parties, the Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343 [hereinafter 1929 GPW] *reprinted in* DOCUMENTS, *supra* note 108, at 178.

[114] 1949 GPW, *supra* note 66, art. 109; 1929 GPW, *supra* note 113, art. 68.

[115] 1949 GPW, *supra* note 66, art. 109. The 1929 GPW, *supra* note 113, art. 68, para. 1, also states, "Belligerents shall be required to send back to their own country, without regard to rank or numbers, after rendering them in a fit condition for transport, prisoners of war who are seriously ill or seriously wounded." These provisions are consistent with the purpose of holding POWs because seriously wounded or sick POWs will not provide a wartime advantage on return to their own country, but instead will impose a logistical burden on the medical system.

[116] Agreement between the United Nations Command, on the One Hand, and the Korean People's Army and Chinese People's Volunteers, on the Other Hand, Concerning the Exchange of Sick and Injured Prisoners of War, April 11, 1953, 28 DEP'T ST. BULL. 5 76, *reprinted in* DOCUMENTS, *supra* note 108, at 626. This agreement facilitated the repatriation of 6670 wounded and sick North Korean and Chinese Communists to the north and the return of 684 wounded and sick United Nations Command personnel to the south. Howard S. Levie, *The Korean Armistice Agreement and Its Aftermath*, 41 NAVAL L. REV. 115, 128 (1993).

[117] Levie, *supra* note 116, at 125.

[118] GPW, *supra* note 66, arts. 109, 110.

POWs who have undergone long term captivity to be repatriated or transferred to neutral countries.[119] In spite of these provisions, states are more likely to delay repatriation until after the conclusion of hostilities.

The logical place to address POW repatriation is in the agreement ending the war. Article 75(1) of the 1929 GPW specifically refers to a duty of the belligerents to include repatriation of POWs in the armistice agreement or discuss the matter and repatriate the POWs "as soon as possible after the conclusion of the peace."[120] This provision emphasizes the inclusion of POW repatriation provisions in the armistice agreement and anticipates the establishment of a repatriation plan. One of its primary weaknesses was in the language referring to the "conclusion of the peace."[121] This allowed belligerents to delay repatriation until after the peace treaty. Unfortunately, as with Germany in World War II, there may not be a peace treaty at the end of the conflict. Additionally, there may be significant delays in executing a peace treaty because of the inability of the parties to resolve political issues. Accordingly, the obligation to repatriate must arise on the occurrence of a definite event.

The 1949 GPW provided that "[plrisoners of war shall be released and repatriated without delay after the cessation of active hostilities."[122] This provided a repatriation requirement independent of the negotiation process but did not resolve the issue of whether the "cessation of active hostilities" included temporary cease-fires, situations where a potential for renewed hostilities exists, or a point in time where both active hostilities cease and there is a likelihood or promise of lasting peace. There are two views on this definition. Judge Lauterpacht took the position that conditions must "render it out of the question for the defeated party

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[119] *Id.* art **109.**

[120] The text of Article 75(1) of the **1929** GPW, *supra* note 113, provides:

> When belligerents conclude an armistice convention, they shall normally cause to be included therein provisions concerning the repatriation of prisoners of war. If it has not been possible to insert in that Convention such stipulations, the belligerents shall, nevertheless, enter into communication with each other on the question as soon as possible. In any case, the repatriation of prisoners shall be effected as soon as possible after the conclusion of the peace.

[121] *Id.*

[122] GPW, *supra* note 66, art. 118. Article 85(4)(b) of the **1977** Geneva Protocol I, *supra* note *66,* includes the "unjustifiable delay in repatriation of prisoners of war or civilians" in the definition of grave breaches.

to resume hostilities."[123] Professor Dinstein contends that this explanation is too strict and adopts Professor Schwarzenberger's interpretation of "when in good faith, neither side expects a resumption of hostilities."[124]

If the obligation to repatriate does not arise until after the cessation of active hostilities, the state's best defense is to claim that the obligation has not yet arisen and that any break in the fighting is not the "cessation of active hostilities" referred to in the GPW. This was the subject of controversy in the conflict between India and Pakistan that broke out in November-December 1971 over the independence movement in Eastern Pakistan to establish Bangladesh. After the surrender of the East Pakistani Army on December 16, 1971, India held over 70,000 POWs and approximately 17,000 civilian internees.[125] On December **21,** 1971, the United Nations Security Council made a determination that **"a** cease-fire and cessation of hostilities prevail between India and Pakistan."[126] In spite of the surrender and the determination of the Security Council, repatriation did not begin until after the Delhi Agreement of August 28, 1973, over 20 months later. India offered a number of arguments to justify the delay in repatriation.[127] The first of these was that the surrender was made to the joint command of India and Bangladesh making both countries part of a joint detaining power and barring India from repatriating the POWs without the consent of Bangladesh. This argument was further complicated by Bangladesh's refusal to repatriate POWs until Pakistan recognized her independence and Pakistan's position that India was an occupying power. India and Bangladesh also wanted to make repatriation conditional on the transfer of Bengals living in Pakistan to Bangladesh and the transfer of non-Bengals living in Bangladesh to Pakistan. A third justification was that repatriation could not be carried out until investigations into war crimes and crimes against humanity had been completed. Finally, India argued that the existence of an unstable military and political climate meant that there was no "cessation of active hostilities" within the meaning of article 118 of the GPW.

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[123]Yoram Dinstein, *The Release of Prisoners of War, in* STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES **37,** 44 (1984) (quoting Judge Lauterpacht; L. OPPENHEIM, 2 INTERNATIONAL LAW **613** (H. Lauterpacht, 7th ed. 1952)).

[124]*Id.* (quoting **G.** SCHWARZENBERGER & E. D. BROWN, A MANUAL OF INTERNATIONAL LAW 175 (6th ed. 1976).

[125]ALLAN ROSAS, THE LEGAL STATUS OF PRISONERS OF WAR: A STUDY IN INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 187 (1976).

[126]United Nations Security Council Resolution 307 (Dec. 21, 1971).

[127]ROSAS, *supra* note 125, at 192-95,488-89.

The GPW is based on the concept of single state responsibility for the detaining power in carrying out the terms of the Convention, so consent of other allies is irrelevant.[128] Because the POWs were detained by India in Indian territory, in the absence of an agreement, India had a unilateral obligation to "establish and execute a plan of repatriation."[129] The only conditions for repatriation are that it be conducted "without delay and after the cessation of active hostilities."[130] The repatriation or exchange of Bengals and non-Bengals between Pakistan and Bangladesh was a political issue that had nothing to do with India's legal obligation to repatriate POWs. Furthermore, the existence of an unstable political or military climate did not equate to active hostilities. Accordingly, the surrender of the East Pakistani Army and the determination of the Security Council that hostilities had ceased, triggered India's responsibility to repatriate without delay.

A potential for renewed hostilities cannot be considered a continuation of active hostilities. Other situations may meet this test, such as certain weather conditions delaying hostilities or simply a break between battles. The lack of open fighting, the surrender of an army, or a United Nations determination that a state of hostilities no longer exists are only a few of the factors to consider when determining whether the obligation to repatriate has been triggered. In some situations, especially those in which there is no surrender or cease-fire agreement, there may be a time element to determine whether it is a pause in the fighting or a "cessation of active hostilities." However, the obligation to repatriate "without delay" should limit this factor to a few months.

The best argument for delaying repatriation was based on India's right, as the detaining power, to investigate and try POWs for crimes committed before capture.[131] In conflicts of short duration, or situations where investigations cannot be completed prior to the end of the conflict, this right could justify a reasonable period of investigation and delay in the repatriation of those POWs accused or convicted of war crimes or of POWs necessary for the prosecution. However, India's twenty-month delay before beginning repatriation

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[128] GPW, *supra* note **66,** art. **12.**

[129] *Id.* art. 118.

[130] *Id.*

[131] *Id.* art 119. The international community also has expressed concern for the unreasonable detention of POWs as "war criminals." The Soviet Union held thousands of German and Japanese POWs following World War II, some of whom were convicted of the crime of "supporting capitalism." Although not specifically mentioned, the Soviet Union was the subject of United Nations General Assembly Resolution 427(V), Measures for the Peaceful Solution of the Problem of Prisoners of War (Dec. **14,** 1950), *reprinted in* DOCUMENTS, *supra* note 108, at 583. In 1955, 9000 Germans were repatriated to the Federal Republic of Germany. *Id.*

cannot be justified on this basis.

Although India's situation is a prime example of an unjustified delay in the repatriation of POWs, it is a rare exception. For the most part, Article 118 has accelerated POW repatriation and it remains a focal point in negotiations for timely release and repatriation of POWs.

Responsibility for the repatriation of POWs remains a unilateral obligation of the detaining power. The duty is not conditioned on the repatriation efforts of the other parties to the conflict. This unconditional unilateral obligation on every detaining power to repatriate POWs without delay at the conclusion of hostilities implies simultaneous repatriation efforts because active hostilities end at the same time for each party to a particular conflict.[132] Mutual repatriation has not always been the rule. A careful examination of state practice indicates that repatriation provisions more often reflect the bargaining positions of the states. Typically, the victor will draft an armistice or cease-fire agreement with a provision imposing an obligation on the losing state to repatriate POWs without a corresponding duty of the victor to repatriate the POWs of the state with the weaker bargaining position.[133] In these situations, the victor is violating its international law obligations and jeopar-

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[132]The Delhi Agreement between India and Pakistan for the Repatriation of Prisoners of War, Aug. 28, 1973, 12 I.L.M. 1080 *reprinted in* DOCUMENTS, *supra* note 108, at 796, expressly followed this principle by providing: "In the matter of repatriation, of all categories of persons the principle of simultaneity will be observed throughout as far as possible." This type of provision must be used with care to avoid making repatriation contingent on the speed of the repatriation efforts of the other party.

[133]Conditions of an Armistice between the Allied and Associated Powers and Germany, Nov. 11, 1918, 13 A.J.I.L., supp. 97, *reprinted in* DOCUMENTS, *supra* note 108, at 114, provided:

> X. The immediate repatriation, without reciprocity, according to detailed conditions which shall be fixed, of all allied and United States prisoners of war, including those under trial and condemned. . . . The return of German prisoners of war shall be settled at the conclusion of the peace preliminaries.

Twenty-two years later Germany reversed roles with France using similar language in the Armistice Agreement between the Chief of the German High Command and French Plenipotentiaries, June 22, 1940, 34 A.J.I.L., supp. 173, *reprinted in* DOCUMENTS, *supra* note 108, at 201, which stated:

> 19. All German prisoners of war and civilian prisoners in French custody, including detained or convicted persons who have been arrested and sentenced for acts committed in the interests of the German Reich are to be handed over immediately to the German troops . . . .
>
> 20. Members of the French armed forces who are prisoners of war in German hands shall remain prisoners of war until the conclusion of peace.

dizing chances for a real and just peace. When the fighting ends with both sides retaining the ability for continued resistance, the peace treaty is more likely to provide for mutual or reciprocal repatriation.[134]

Another potential problem occurs in wars with allied commands. When active hostilities with one allied party end, that party, as a detaining power, must repatriate the POWs under its care; it cannot avoid its repatriation obligations by transferring them to its ally that is continuing to fight. This view promotes the earliest possible repatriation of POWs, and there is considerable state practice supporting this position.[135] A counter argument is that the detaining power's first obligation is to safeguard the POWs in its possession. If the safety of the POWs requires their evacuation out of the area of operations to another country prior to the end of active hostilities, the detaining power has an obligation to safeguard the POWs and seek to transfer them in a manner consistent with the GPW.[136] However, all POWs that remain in the possession

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The practice of delaying repatriation until after the peace treaty was consistent with Article 75 of the 1929 GPW, *supra* note 113. This provision was changed in Article 118 of the 1949 GPW, *supra* note **66,** to require repatriation at the end of active hostilities.

[134]Article 10 of the Agreement for an Armistice between the Soviet Union and the United Kingdom, Acting on Behalf of All the United Nations at War with Finland, on the One Hand, and Finland on the Other Hand, Sept. 19, 1944, 39 A.J.I.L., supp. 85, *reprinted in* DOCUMENTS, *supra* note 108, at 256, provided:

> Finland undertakes immediately to transfer to the Allied (Soviet) High Command, to be returned to their homeland, all Soviet and allied prisoners of war now in her power and also Soviet and allied nationals who have been interned in or deported by force to Finland . . . . At the same time Finnish prisoners of war and interned persons now located on the territory of allied States will be transferred to Finland.

[135]Both the Allied and the Axis powers used this practice during the World War II. In the Armistice Agreement between the Chief of the German High Command and French Plenipotentiaries, June 22, 1940, 34 A.J.I.L., supp. 173, *reprinted in* DOCUMENTS, *supra* note 108, at 201, the French government agreed "to prevent German prisoners of war or civilian prisoners from being removed from France to French possessions or abroad. Correct lists are to be supplied of prisoners already removed from France." The Allies also emphatically pursued this course in both the Military Armistice between the Allied Forces and Italy (Sept. 3, 1943) and the Instrument of Surrender, 61 Stat. 2740 (Sept. 29, 1943), *reprinted in* DOCUMENTS, *supra* note 108, at 249. The Armistice provided "All prisoners or internees of the United Nations to be immediately turned over to the Allied Commander in Chief, and none of these may now or at any time be evacuated to Germany." *Id.* The Instrument of Surrender provided more detail as to the forces and subjects covered and stated that "Any removal [of persons covered] during the period between presentment and signature of the present instrument will be regarded as a breach of its terms." *Id.*

of a detaining power for which hostilities have ceased must be repatriated.

As to the actual process of repatriation, all POWs usually are returned at approximately the same time, especially in conflicts of short duration with a relatively small number of POWs. However, in some situations, parties have found it necessary to establish criteria and prioritize repatriation based on categories (i.e., sick, wounded, or returning those POWs who have been held the longest first.)[137]

Article 119 of the GPW also provides for supervision of the repatriation process, "By agreement between the Parties to the conflict, commissions shall be established for the purpose of searching for dispersed prisoners of war and of assuring their repatriation without delay." This provision is an important requirement in the repatriation regime, especially when closed societies are involved. It is intended to provide assurance for both parties that all POWs have been given access to the repatriation process, and must be interpreted to require the states involved to provide these commissions with all of the power and cooperation necessary to conduct a thorough search for POWs.

Timeliness of repatriation is not the only controversial provision in the law of POW repatriation. The most debated issue since World War II has been the issue of forced versus voluntary repatriation. From the states' perspective, this issue was largely the result of the bipolar political views of the East-West Cold War and driven by the propaganda value of POWs choosing another political system over the one in favor of which they were recently fighting. For the individual POW, this is an issue that did not exist prior to the development of individual rights in international law. The traditional view was that only states had rights in international law. Individual POWs were not given the right to refuse repatriation against the wishes of their country. This issue was to be determined by the states, specifically the detaining power and the POWs' state of nationality or the power for which he was fighting.

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[136] GPW, ***supra*** note 66, art. **12,** only allows the transfer of POWs to other state parties to the GPW that are willing and able to apply the Convention. The power to which the POWs are transferred is responsible for them as long as they are in its custody, but if it violates the terms of the Convention in its care of the POWs, the transferring state must "correct the situation or shall request the return of the prisoners of war. Such requests must be complied with." *Id*.

[137] In Article 4(a) of the 1973 Vietnam Personnel Protocol, ***supra*** note 102, the parties established a 60-day time limit for the repatriation of all captured persons and article 4(b) provided: "Persons who are seriously ill, wounded or maimed, old persons and women shall be returned first. The remainder shall be returned either by returning all from one detention place after another or in order of their dates of capture, beginning with those who have been held the longest."

The shift in the concern from states interests to those of the individual is a relatively recent development. The barter system of assigning a value to officers and men in the exchange of POWs in the early part of the nineteenth century was consistent with the law of the times, but would be unheard of today and a violation of customary international law.[138] Humanitarian law has evolved along with the vast body of more generalized human rights law to provide greater protection for individuals under international law.

Progress in the development of international humanitarian law is not without setbacks. A quick study of the issue of voluntary repatriation in this century provides an interesting case study for this evolution. Historically, there is considerable state practice allowing POWs to choose repatriation.[139] In early Soviet treaties following World War I, Russia gave its POWs freedom to choose whether they wanted to be repatriated.[140] Later Soviet treaties reversed this practice with devastating consequences.[141] The repa-

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[138]An example of this is in the Treaty of Peace and Amity between the United States of America and the Bashaw, Bey, and Subjects of Tripoli, in Barbary, June 4, 1805, 8 Stat. 214, *reprinted in* DOCUMENTS, *supra* note 108, at 16, which stated that:

> Art 16th. If in the fluctuation of human events, a war should break out between the two nations, the prisoners captured by either party shall not be made slaves, but shall be exchanged rank for rank. And if there should be a deficiency on either side, it shall be made up by the payment of five hundred Spanish dollars for each captain, three hundred dollars for each mate and supercargo, and one hundred Spanish dollars for each seaman so wanting. And it is agreed that prisoners shall be exchanged in twelve months from the time of their capture; and that the exchange may be effected by any private individual legally authorized by either of the parties.

[139]59 HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT, INTERNATIONAL LAW STUDIES 421-22 (1979).

[140]Treaty of Peace of Brest-Litovsk Between Germany, Austria-Hungary, Bulgaria, and Turkey on the One Hand, and Russia on the Other: Together with a German-Russian Agreement Supplementary to the Peace Treaty, Mar. 3, 1918, 1 SOVIET DOCUMENTS ON FOR. REL., 1917-1924, at 50, *reprinted in* DOCUMENTS, *supra* note 108, at 94 Article 8 of this treaty provides in part: "That the prisoners of war of both parties will be allowed to return home." *Id*. Article 17 of the Supplementary German-Russian Agreement to this treaty states:

> The exchange of prisoners of war provided for in Article 8 of the peace treaty is governed by the following regulations:
>
> 1. The prisoners of war of both parties shall be set at liberty to return home, in so far as they do not desire, with the consent of the state which took them prisoners, to remain within its boundaries, or leave for another country.

Id. The Annex to Article 9 of the Treaty of Peace between Russia and Estonia, Feb. 20, 1920, 11 L.N.T.S. 51, *reprinted* in DOCUMENTS, *supra* note 108, at 169, also gave POWs the choice of repatriation by providing: "Prisoners of war of both contracting Parties shall be repatriated, unless they prefer to remain in the country in which they are (with the consent of the Government of that country), or to go to some other country."

triation problems of World War II had a large impact on the drafting of Article 118 of the 1949 GPW. Because thousands of prisoners from World War II had not yet been repatriated, the primary concern was that prisoners be repatriated as soon as possible, regardless of whether a peace treaty existed.

A requirement for expeditious repatriation does not resolve the issue of forced repatriation. Article 118 simply states that POWs "shall be released and repatriated."[142] The drafters of Article 118 rejected a proposal by the Austrian delegation which would have taken into consideration the wishes of each POW.[143] The concern of the delegates from the Soviet Union and the United States was that POWs may be subjected to coercion on the part of the detaining power that might prevent them from making a voluntary decision in favor of repatriation.

This issue reflects the basic distrust that states have in the conduct of other belligerent states during the cease-fire process. Those in favor of forced repatriation believe that the vast majority of POWs want to return home and that if, for political or other reasons, a detaining power is allowed to persuade POWs into seeking asylum and losing their POW status as a defector or refusing repatriation, more prisoners would be in jeopardy of losing their protection and freedoms. Those who take the opposite view believe that POWs are entitled to protection from all states including their own and that more POWs would be protected if each individual was given the right or freedom to choose repatriation.

Article 118 became a focal point at the end of the Korean War with strong arguments presented on both sides of the issue.[144] The Korean and Chinese representatives argued that this provision required mandatory repatriation regardless of the wishes of the POWs. In support of this view, Article 5 paragraph 1 states that the

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[141] Agreement between the United States of the America and the Union of Soviet Socialist Republics Respecting Liberated Prisoners of War and Civilians Liberated by Forces Operating under Soviet Command and Forces Operating under United States of America Command, Feb. 11, 1945, 59 Stat. 1874, *reprinted in* DOCUMENTS, *supra* note 108, at 258. This agreement, concluded at Yalta, is alleged to have caused the suicides of thousands of Russian POWs recovered by United States forces to avoid repatriation. It is also claimed to have led to the execution and exile of thousands of other prisoners on their return to the Soviet Union. *Id.*

[142] GPW, *supra note* 66, art. 118.

[143] *See* Levie, *supra* note 116, at 126-27 (describing the drafting history of this provision).

[144] The following list of arguments is compiled from ROSAS, *supra* note 125 at 478-86; J. PICTET, COMMENTARY TO THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 542-45 (Geneva ICRC 1960); UNITED STATES DEP'T OF STATE, LEGAL CONSIDERATIONS UNDERLYING THE POSITION OF THE UNITED NATIONS COMMAND REGARDING THE ISSUE OF FORCED REPATRIATION OF PRISONERS OF WAR (1953).

GPW applies to POWs until their "final release and repatriation" and Article 7 prevents POWs from renouncing their rights under the Convention. Additionally, Article 109 gave the POW the option of repatriation during hostilities, but the proposal to include this choice in Article 118 was rejected.

The United Nations command took the opposite view. They argued that the GPW is intended to protect POWs and does not exclude any other safeguards that POWs might have under international law. States have a long-standing customary international law right to grant asylum to political refugees, defectors, and deserters and a grant of asylum would exempt the individual requesting asylum from POW status. Additionally, Article 118 does not require POWs to accept repatriation and involuntary repatriation is not one of the "rights" referred to in Article 7 and forcible repatriation does not constitute a "release" under Articles 5 and 118.

The armistice agreement ending the Korean War allowed prisoners to choose repatriation.[145] That agreement incorporated an additional protection designed to prevent the possibility of coercion being used against POWs; a Neutral Nations Repatriation Commission was established to supervise the repatriation process and ensure that each POW made a voluntary and informed decision regarding repatriation.[146]

Although the ICRC has consistently supported voluntary repatriation, in its 1960 Commentaries to the Geneva Convention Relative to the Treatment of Prisoners of War, the ICRC discounted the voluntary repatriation practice used in the Korean War because "the essential provisions of the Convention were not applied" and this affected the application of Article 118.[147] Accordingly, the "decisions taken with regard to repatriation after the Korean conflict must therefore be considered as makeshift solutions adapted to the special circumstances of a conflict between two parties of a single

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[145] Agreement Between the Commander-in-Chief, United Nations Command, on the one Hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, on the Other Hand, Concerning a Military Armistice in Korea, July 23, 1953, 4 U.S.T. 234, ***reprinted in*** DOCUMENTS, ***supra*** note 108, at 635, provided in article 51(a) that "each side shall, without offering any hindrance, directly repatriate and hand over in groups all those prisoners of war in its custody who insist on repatriation to the side to which they belonged at the time of capture."

[146] Agreement between the United Nations Command, on the One Hand, and the Korean People's Army and the Chinese People's Volunteers, on the Other Hand, Concerning Prisoners of War: including the Terms of Reference for the Neutral Nations Repatriation Commission, June 8, 1953, 4 U.S.T. 262, ***reprinted in*** DOCUMENTS, ***supra*** note 108, at 629.

[147] J. PICTET, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 546 (Geneva ICRC 1960).

country. One cannot draw any valid conclusions for the future from them."[148]

The Korean War cannot be properly characterized as a conflict between North and South Korea. It was truly an international conflict with a United Nations command on one side and an alliance between North Korea and the People's Republic of China on the other side. Additionally, the GPW was drafted with the interests of the POW in mind, not the state of origin or the protecting power. It must not be applied, whether in routine or special circumstances, in a manner that would deprive an individual POW of his rights under customary international law.

In its commentary, the ICRC provided an interpretation of Article 118 that would apply in situations where the convention was being implemented in its entirety by the parties to the conflict.[149] This interpretation reiterates the duty of the detaining power to repatriate all POWs at the conclusion of hostilities but stated:

> No exception may be made to this rule unless there are serious reasons for fearing that a prisoner of war who is himself opposed to being repatriated may, after his repatriation, be the subject of unjust measures affecting his life, or liberty, especially on the grounds of race, social class, religion, or political views, and that consequently repatriation would be contrary to the general principles of international law for the protection of the human being. Each case must be examined individually.[150]

This interpretation is intended to be a narrow exception giving the detaining power the final decision of whether to repatriate the POWs in its care.

However, this interpretation is not as narrow as it seems. With the rapid expansion of human rights law, the phrase "repatriation would be contrary to the general principles of international law for the protection of the human being" provides the greatest safeguards for the POW who objects to repatriation.[151] Expansion and development of the principle of nonrefoulement in refugee law is one example of human rights law providing a basis for protection

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[148] *Id.*

[149] *Id.* at 546.

[150] *Id.* at 547.

[151] It may be argued that the Geneva Conventions specifically protect victims during time of war to the exclusion of other human rights law. The validity of this proposition is questionable and clearly does not apply *after* hostilities when all international human rights law and humanitarian law is applicable.

against forced repatriation.[152]

The ICRC interpretation also forbids the use of coercion against POWs making this decision and states that supervisory bodies must be able to determine whether the POWs are being allowed to make voluntary, informed, and sincere choices.[153] Additionally, it specifically refers to the ability of the parties to make special agreements under Article 6 to satisfy the concerns of POWs refusing repatriation.[154]

The United Nations General Assembly also addressed this issue a number of times in different contexts and consistently favored freedom of choice for POW repatriation.[155]

By its text, Article 118 neither compels the detaining power to accept as refugees those POWs who choose not to be returned, nor does it impose a duty on the detaining power to refuse to repatriate POWs whose life and liberty could be at risk. The obligations of the detaining power under Article 118 of the GPW have been modified by state practice and developments in human rights law. The substantial increase in the recognized rights of the individual in recent years has played a large part.[156] In those situations where involuntary repatriation has been an issue, a practice of allowing POWs the

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[152]Article 33 of the Convention Relating to the Status of Refugees, in force April 22, 1954, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention] states the rule of nonrefoulement as, "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular group, or political opinion."

[153]J. PICTET, COMMENTARY TO THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 548 (Geneva ICRC 1960).

[154]GPW, *supra* note 66, art. 6, allows parties to "conclude other special agreements for all matters concerning which they may deem it suitable to make a separate provision." However, these agreements may not "adversely affect the situation of prisoners of war, as defined by the present Convention, nor restrict the rights which it confers upon them." *Id.*

[155]G.A. Res 382, 5 U.N. GAOR, supp. 20, at 14, U.N. Doc. A/1775 (Dec. 1,1950), *reprinted in* DOCUMENTS, *supra* note 108, at 581, concerned members of the Greek armed forces captured in a Communist attempt to take over Greece and recommended the repatriation of POWs "who express the wish to be repatriated." G.A. Res 427, 5 U.N. GAOR, supp. 20, at 45, U.N. Doc. A11775 (Dec. 14, 19501, *reprinted in* DOCUMENTS, *supra* note 108, at 583, also called for the prompt "unrestricted opportunity of repatriation." Although it did not mention any country by name, it was directed against the Soviet Union who continued to hold POWs captured during World War II. In reference to the Korean Conflict, the General Assembly again stated that "force shall not be used against prisoners of war to prevent or effect their return to their homelands." G.A. Res. 610, 7 U.N. GAOR supp. 20, at 3, U.N. Doc. A/2361 (Dec. 3, 1952), *reprinted in* DOCUMENTS, *supra* note 108, at 622.

[156]In paragraph 23 of the Vienna Declaration and Programme of Action of 25 June 1993, the World Conference on Human Rights reaffirmed "that everyone, without distinction of any kind, is entitled to the right to seek and enjoy in other countries asylum from persecution, as well as the right to return to one's own country." Article 12 of the African Charter on Human and Peoples' Rights, June 28, 1981, OAU

freedom to choose or refuse repatriation has emerged.[157]

Following the 1991 Persian Gulf War, the coalition forces took the position that Iraqi POWs must indicate their consent to return to Iraq before being repatriated.[158] At the repatriation site, the ICRC reconfirmed each POW's choice prior to turning him over to the Iraqi authorities.[159]

Two separate parts of Resolution 686 provided for the repatriation of POWs in the 1991 Gulf War. In paragraph 3 (c), the Security Council demanded that Iraq "arrange for immediate access to and release of all prisoners of war under the auspices of the International Committee of the Red Cross and return the remains of any deceased personnel of the forces of Kuwait and the Member States cooperating with Kuwait"[160] As to the coalition forces, the Security Council, in paragraph 4 of the resolution, welcomed "the decision of Kuwait and the Member States cooperating with Kuwait . . . to provide access and to commence immediately the release of Iraqi prisoners of war as required by the terms of the Third Geneva Convention of 1949, under the auspices of the International Committee of the Red Cross."[161] Read together, these provisions require the mutual voluntary repatriation of all POWs. Because Resolution 686 was adopted only two days after the decision of the coalition forces to cease offensive operations, it also provides for timely access to repatriation.

The 1991 Gulf War repatriation process was conducted under the authority of the United Nations with the active participation and support of virtually every nation. It was consistent with state practice developed over the last forty years and should have resolved any controversy regarding this issue. Accordingly, customary law requires the detaining power to allow POWs to voluntarily

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Doc. CAB/LEG/67/3/Rev. 5 (1981), *reprinted in* 21 I.L.M.58 (1982), provides an example of a broad regional freedom of movement provision and states that "every individual shall have the right to leave any country including his own, and to return to his country." It also prohibits the mass expulsion of nonnationals and states that "mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups." Id.

[157] In the Korea War and the 1991 Persian Gulf War, involuntary repatriation was an issue and POWs were provided an option. Prisoners of war were not given a choice in the Indo-Pakistani Conflict of 1971 (where it was not an issue) or in the Vietnam Agreement and Vietnam Protocol because South Vietnam already had released most of those objecting to repatriation. 59 HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT, INTERNATIONAL LAW STUDIES 426 n.159 (1979).

[158] CONDUCT OF THE GULF WAR, *supra* note 110, at 620.

[159] *Id.*

[160] U.N. Doc. S/RES/686 (1991).

[161] *Id.*

decide whether they want to be repatriated.

The practice of using Neutral Nation Repatriation Commissions in Korea and the Persian Gulf War has provided POWs an added safeguard to protect them from coercion, ensured that they made a free choice concerning repatriation, and guaranteed that all POW rights are respected during the repatriation process.[162] Properly used, these neutral commissions resolve most of the fears of the forced repatriation advocates and more importantly, protect the individual human rights of POWs with valid reasons for objecting to repatriation.

Prisoners of war refusing repatriation may find themselves in a difficult position. Questions remain as to when POW status is terminated, the effect that POWs' refusal to be repatriated have on their nationality, their status as refugees, and what to do when there is no state sponsor to accept former POW refugees. Repatriation efforts following the 1991 Persian Gulf War lasted five months and, at the end of this process, 13,318 Iraqi POWs refused repatriation and were reclassified as refugees.[163] This reclassification was conducted by the United States in coordination with Saudi Arabia and the ICRC.[164] The timing of any reclassification will depend on the number of POWs and the speed of the repatriation processing of the detaining power and protecting power (usually the ICRC). A POW cannot be reclassified as a refugee until it is absolutely certain that he does not want to exercise his right to repatriation. The significance of reclassifying a POW as a refugee is that the GPW will no longer apply to him.[165] However, to qualify as a refugee, the individual must have a well-founded fear of persecution for reasons related to race, religion, nationality, political opinion, or membership in a particular social group.[166] If a person does not fit this definition, then he is considered a "displaced person" and

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[162] Agreement between the United Nations Command, on the One Hand, and the Korean People's Army and the Chinese People's Volunteers, on the Other Hand, Concerning Prisoners of War: including the Terms of Reference for the Neutral Nations Repatriation Commission, June 8, 1953, 4 U.S.T. 262, reprinted in DOCUMENTS, supra note 108, at 629; CONDUCT OF THE GULF WAR, supra note 110, at 620.

[163] CONDUCT OF THE GULF WAR, supra note 110, at 620.

[164] *Id.*

[165] GPW, supra note 66, art. 5, states that the Convention applies until "final release and repatriation." The argument used in the Gulf War was that because these POWs have exercised their right to refuse repatriation, the action of the detaining power and the ICRC reclassifying them as refugees constitutes a final release. The alternative would be to require the detaining power to provide all of the rights and protections of the GPW indefinitely or until another state granted them asylum.

[166] *See* supra note 152.

may be protected under the Geneva Convention, but is not entitled to refugee status. All of the POWs refusing repatriation in the Gulf War were considered to meet the refugee definition.[167]

Refugee status does not provide a permanent solution for these victims of war.[168] Once the detaining power has been relieved of its obligations under the GPW with the reclassification of former POWs as refugees, the host state (which may not be the same as the detaining power) must provide them with basic assistance. Refugees also have a right to seek asylum from the host state. The host state is not alone, however, because the international community also bears some responsibility to provide humanitarian assistance and find a home for them.[169]

For POWs choosing repatriation, states can impose an obligation on both parties to protect their returning POWs through the use of an amnesty clause.[170] The inclusion of an amnesty clause also may form the basis of an argument against granting refugee status to POWs refusing repatriation because they no longer have a "well-founded fear of persecution.'' However, an amnesty clause is

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[167]There are six circumstances where an individual may lose his status as a refugee:

> (1)He voluntarily has reavailed himself of the protection of the country of his nationality; or
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> (2) Having lost his nationality, he has voluntarily reacquired it; or
>
> (3)He has acquired a new nationality and enjoys the protection of the country of his new nationality; or
>
> (4) He has voluntarily re-established himself in the country which he left, or outside which he remained, owing to fear or persecution; or
>
> **(5)** Because of circumstances in connection with which he has been recognized as a refugee have ceased to exist, he no longer can continue to avail himself of the protection of the country of his nationality; or
>
> (6) Being a person who has no nationality, he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence.. . .

1951 Refugee Convention, *supra* note 152, art. 2. *See also* Protocol Relating to the Status of Refugees, Oct. 4, 1967, 19 U.S.T. 6223,606 U.N.T.S. 267.

[168]Months after the repatriation process was completed, a large number of former POWs continued to be confined in camps. Caryle Murphy, *War Refugees Remain in Saudi Camps—33,000 Iraqis at Isolated Desert Sites Include 12,000 Ex-POWs*, **WASH.** POST, Jan. 25, 1992.

[169]To oversee international refugee assistance, the United Nations General Assembly established The Office of the United Nations High Commissioner for Refugees (UNHCR). G.A. Res. 428(V) (Dec. 14, 1950), U.N. Doc. A/RES/428(V) (1950).

[170]Article 7 of the Agreement between Germany and the Russian Socialist Federal Soviet Republic with regard to the Mutual Repatriation of Prisoners of War and Interned Civilians, Apr. 19, 1920, 2 L.N.T.S. 66, *reprinted in* DOCUMENTS, *supra* note 108, at 171, provided that "Each of the two contracting parties guarantees indemnity from punishment to those repatriated persons who may have taken action against the constitution of their state either by political agitation or by arms."

intended to provide additional protection to POWs exercising their right to repatriation. It is not intended to limit the right of POWs to refuse repatriation. Although it may be difficult to verify compliance and enforce amnesty provisions, especially in closed societies, amnesty provisions provide additional pressure on governments to respect the rights of their returning POWs.

The detaining power has the right to continue to hold any POW "convicted of an indictable offense," but the detaining power must communicate the names of these POWs to the other party.[171] Article 115 also gives the detaining power the option to decide whether a POW "detained in connection with a judicial prosecution or conviction'' should benefit from a repatriation provision and echoes the requirement that the states keep the other parties informed of those detained under Article 115.[172] Neither of these provisions require the detaining power to continue to hold POWs and the repatriation provision in the cease-fire agreement may include a special agreement under Article **6** which requires repatriation of those detained for criminal offenses.[173] In a protocol to the Vietnam Agreement, the parties specifically agreed to provide for the return of detained POWs and foreign civilians by stating:

> Each party shall return all captured persons mentioned in Articles **1** and **2** of this Protocol without delay and shall facilitate their return and reception. The detaining parties shall not deny or delay their return for any reason, including the fact that captured persons may, on any grounds, have been prosecuted or sentenced.[174]

Article 118 also provides a partial solution to the issue of responsibility for the costs of repatriation. Article 118 provides some basic guidelines for the allocation of costs between contiguous and noncontiguous states, but the overriding principle of Article 118 is that costs "shall be equitably apportioned between the Detaining Power and the Power on which the prisoners depend."[175] If any dispute over the payment of the costs exists, the governments must

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[171] GPW, *supra* note 66, art. 119. The term "indictable offense" replaced the phrase "a crime or offense at common law" in Article 75 of the 1929 GPW, *supra* note 113, to clarify the intention that it only apply to criminal proceedings. J. PICTET, COMMENTARY TO THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 556 (Geneva ICRC 1960).

[172] GPW, *supra* note 66, art. 115.

[173] *Id.* Article 6 allows the parties to conclude a special agreement for the detaining power to allow all POWs detained in connection with an indictable offense to be voluntarily repatriated since this does not "adversely affect the situation of [the] prisoners of war." Id.

[174] 1973 Vietnam Personnel Protocol, *supra* note 102, art. 6.

[175] GPW, *supra* note 66, art. 118.

settle their accounts and may not use this as an excuse to delay the repatriation of POWs.

Prisoner of war repatriation law emphasizes the need to resolve a number of issues in the cease-fire agreement so that the POW repatriation process may be concluded as smoothly and quickly as possible. The law concerning POW repatriation is well settled and debates over this issue must not delay the cease-fire process. Under customary and conventional international law, the interests of the individual POW are paramount. If the parties have reached an agreement establishing an efficient repatriation plan that is consistent with international law, this agreement should be followed. If they are unable to reach an agreement, the international community must step in and put pressure on the parties to carry out a proper plan.

C. Accounting for the Missing and the Dead

At the close of every war a large number of people remain missing. Traditionally, customary international law did not require the parties to a conflict to exchange information or search for some categories of missing and dead persons. Information regarding the fate of those who were lost during a conflict remained with the survivors and those cleaning up the battlefield. There was no obligation for the belligerents to gather and exchange information about the missing and dead, and because of the lack of communication between the parties during the conflict, a large majority of the missing remained unaccounted for after war.

A duty to account for missing and dead military personnel began to emerge with the rapid expansion of humanitarian law in the early twentieth century.[176] The Geneva Conventions established many obligations in this area, but they also left a number of gaps. The first three Geneva Conventions were designed to protect military personnel or participants in armed conflicts.[177] The fourth and final convention established some duties to account for civilians, but only those falling within certain protected categories.[178] In addition

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[176] 1907 Hague Regulations, ***supra*** note 9, art. 21, stated that: "The obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention." Although this provision referred to the 1906 version, the latest versions of the Geneva Conventions governing wounded and sick also include provisions governing the missing and dead.

[177] GWS, ***supra*** note 66, art. 13; GWS (Sea), ***supra*** note 66, art. 13; GPW, ***supra*** note 66. art. **4.**

to the four Geneva Conventions of 1949, the 1977 Protocols provide expanded protection for missing and dead following armed conflicts.

The Geneva Conventions reflect customary international law in this area and provide different obligations with respect to combatants and civilians. The most extensive duties apply to military personnel (prisoners of war and wounded and sick combatants). These duties can be divided into obligations to: search for the missing and dead; identify casualties; and report or exchange information. The following section will briefly discuss the current law under the Geneva Conventions as they apply to members of the military and civilians as well as recent developments under the 1977 Protocols and state practice.

The protections of the Geneva Conventions only apply to international armed conflicts with the exception of Article **3,** which is common to all of the Conventions and provides a minimum level of protection in cases of civil war or other conflicts not of an international character. Article **3** does not impose an international obligation on the state to account for the missing and dead in internal conflicts; this remains a domestic matter. Protocol II to the 1949 Geneva Conventions is designed to provide additional protection to victims of noninternational armed conflicts.[179] This Protocol has not been widely adopted and cannot be considered customary international law, but for state parties and those states who choose to apply it to internal conflicts, it does provide some additional protections. It does not contain a duty to identify and report prisoners and dead persons to the adverse party, but under Article 8, it includes a duty to search for, collect, and care for the wounded, sick, and to search for and dispose of the dead.[180]

1. Military Personnel — The problem of military personnel missing in action is one of enormous proportions. There are approximately 78,750 Americans unaccounted for from World War II,[181] despite that the United States won the war and had access to

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[178]GC, *supra* note 66, art. **4,** includes persons "in the hands of a Party to the conflict or Occupying Power of which they are not nationals." It specifically excludes from protection:

> Nationals of a State which is not bound by the Convention . . . , nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent . . . while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

[179]1977 Geneva Protocol 11, *supra* note *66.*

[180]*Id.* art. 8.

[181]UNITED STATES DEP'T OF DEFENSE, POW-MIA FACTBOOK **52** (Oct. 1992).

search all of the battle grounds. Missing personnel from World War II continue to be found and as recently as June 1991, the remains of five United States personnel were recovered from Papua New Guinea.[182] There are over 8100 United States personnel from the Korean War who remain unaccounted for, even after 3748 United States POWs were repatriated in Operations Little Switch and Big Switch, and the remains of 1868 United States personnel were returned in Operation Glory.[183] Out of the 1868 remains returned in Operation Glory in 1954, 866 were declared unknown.[184] By comparison, as of October 15, 1992, there were 2265 Americans still missing after the conflict in Southeast Asia.[185] In Operation Desert Storm, there were a total of fifty-two military personnel from the coalition forces originally listed as missing in action, but twenty-three were POWs who were repatriated and twenty-six were killed in action with their bodies recovered; only three were listed as killed in action and their bodies not recovered.[186] The number of people missing and dead will depend on a number of factors including the size of the conflict, terrain, communications and identification technology, access to battlefields, and rapid and cooperative search and identification efforts.

Accounting for missing and dead persons can be divided into a basic three-step process with duties to search, identify, and report any person or body found. For international armed conflicts, the Geneva Conventions impose a variety of obligations to search for, identify, and report wounded, sick, and dead combatants and to identify and report the condition of POWs. Articles 15, 16, and 17 of the GWS "may be said to form a single unit, covering as they do the search for casualties and for the dead, their removal, and the recording and forwarding of information about them."[187]

Article 15 of the GWS provides, in part, the obligation to search for wounded, sick, and dead combatants:

> At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to

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[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.* at *7*.

[186] *Id.* at *54*.

[187] J. PICTET, COMMENTARY TO THE GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD **150** (Geneva ICRC 1952).

> ensure their adequate care, and to search for the dead and prevent their being despoiled[188]

The obligations of Article 15 are considered battlefield duties to be fulfilled as soon as possible at the scene of the fighting. This provision also calls for a temporary suspension of hostilities "whenever circumstances permit, . . . to permit the removal, exchange and transport of the wounded left on the battlefield."[189] The duty to search for the wounded and dead is a continual one and must be carried out whenever practicable. Article 15 does not indicate how extensive this obligation is and if there are dead personnel located in a minefield or in a contaminated area, it may be impracticable to retrieve them until much later. The sense of urgency that applies to the search for the wounded and sick ("without delay, take all possible measures") is not restated in the duty to search for the dead for obvious reasons. Again, this duty to search only applies to the combatants and does not create any obligation on the part of the belligerents to search for wounded and dead civilians. It also includes all combatants and does not specifically mention missing personnel since they cannot be considered missing until reported as unaccounted for by the opposing party.[190]

Theoretically, there should not be any need to search for POWs, who by definition, are "those who have fallen into the power of the enemy."[191] However, the GPW provides for the establishment of a commission to search for dispersed POWs to ensure that they are provided access to the repatriation process.[192]

To assist in the identification of POWs and remains, parties to a conflict must ensure that their service members carry proper identification.[193] Identity cards only are required to provide name, rank, serial number, and date of birth, but also may contain any other information that may assist in the identification of the service member.[194] These cards are especially important in the identification of those combatants who are unable to identify themselves.

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[188] GWS, *supra* note 66, art. 15. The GWS (Sea), *supra* note 66, art. 18, provides the same requirements to search for the wounded, sick, and dead at sea.

[189] *Id.*

[190] *See* GWS, *supra* note 66, art. **4** (stating that Neutral Parties also must apply the Convention to wounded and sick combatants interned in their territory and to any dead personnel found).

[191] *Id.*

[192] *Id.* art. 113, para. **7** ("By agreement between the Parties to the conflict, commissions shall be established for the purpose of searching for dispersed prisoners of war and of assuring their repatriation with the least possible delay.").

[193] *Id.* art. 18.

[194] *Id.* art. **17.** The Convention specifically mentions the owner's fingerprints or signature as examples of additional information that may be added to the card. The United States is currently in the process of establishing an identification card using

Furthermore, each party must establish an information bureau to report certain information about detained POWs to the Central Prisoners of War Agency.[195]

Article 16 of the GWS also requires the identification of wounded, sick, and dead enemy combatants. It provides, in part, that "[p]arties to the conflict shall record as soon as possible, in respect of each wounded, sick or dead person of the adverse Party falling into their hands, any particulars which may assist in his identification."[196] These particulars include: name; serial number; date of birth; date and place of capture or death; and information concerning wounds or illness or the cause of death.[197] By including the phrase "any particulars which may assist in his identification," this article includes new developments in technology and requires the gathering of any information that may be needed in new methods of identification.

Article 16 of the GWS also includes the final step in accounting for the wounded and sick: reporting. The list of information gathered on each individual must be forwarded to the Information Bureau established for POWs.[198] This provision only applies to enemy personnel and provides special protection for wounded and sick POWs in addition to the identification and reporting requirements of the GPW.[199] For the reporting to be effective, it must be timely and accurate. This requires that the parties use the latest communication technology for their reporting procedures.

For dead combatants, Article 17 of the GWS also requires proper identification and reporting. It provides, in part, that:

Deoxyribonucleic acid (DNA) technology for the identification of remains of service members. This technology allows identification using any tissue, a major improvement over methods that rely on the condition of the remains (i.e., fingerprints and dental records) *See* Wendy Melillo, *The Cutting Edge—Genetic Record Will Help Identify Unknown Soldiers*, WASH. POST, Jan. 14, 1992, at A5.

[195]GPW, *supra* note 66, art. 122.

[196]*Id.* art. 16.

[197]*Id.*

[198]*Id.* For a description of the National Information Bureau *see* GPW, *supra* note 66, *art.* 122. There also is a Central Prisoners of War Information Agency. *Id.* art. 123. *See also* Vaughn A. Ary, *Accounting for Prisoners of War: A Legal Review of the United States Armed Forces Identification and Reporting Procedures*, ARMY LAW., Aug. 1994, at 16.

[199]Technically, dead enemy personnel mentioned in GWS, *supra* note 66, art. 16, are not covered in the GPW which only applies to living persons entitled to POW status as defined in the GPW, art. 4. Article 17, GPW, *supra* note 66 addresses the questioning and information to be provided in identifying POWs. Article 120 establishes procedures for the detaining power to report the death and burial of POWs and Article 122 requires detaining powers to report certain identifying information about POWs in their custody to the Central Prisoners of War Agency "within the shortest possible period." *Id.*

> Parties to the conflict shall ensure that burial or cremation of the dead, carried out individually as far as circumstances permit, is preceded by a careful examination, if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made. One half of the double identity disc, or the identity disc itself if it is a single disc, should remain on the body.[200]

Article 17 also limits the use of cremation to "imperative reasons of hygiene or for motives based on religion" with the reasons for cremation stated on the death certificate.[201]

In addition to the requirement of Article 16 to examine all wounded, sick, or dead for identification purposes, this article imposes an independent obligation to examine the dead before burial or cremation.[202] The importance of properly identifying a body cannot be over emphasized. If circumstances require group burial or cremation, proper identification may be impossible later.[203]

The fast-paced combat requirements of modern warfare place extreme pressure on members of the armed forces who are preoccupied with mission requirements and an overwhelming concern for the living. They inevitably will resort to prioritizing tasks, which may result in a lengthy delay in identifying the dead. However, it is at the time of death or shortly thereafter, that identification is easiest and most accurate. If a soldier is not identified soon after death, especially one who has been subjected to extreme violence and who has left little in the way of remains, there is a very real chance that he will always be listed as missing in action. Senior officers must stress the importance of identifying both enemy and friendly casualties and ensure that all of the members of the military are educated about this legal obligation and make it a priority.

Article 17 also imposes reporting requirements on the Graves Registration Services of the parties to the conflict by stating that "[a]s soon as circumstances permit, and at latest at the end of hostilities, these Services shall exchange . . . lists showing the exact location and markings of the graves, together with particulars of the dead interred therein."[204] Proper reporting under this provision

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[200] GWS, *supra* note *66,* art. 17.

[201] *Id.*

[202] J. PICTET, COMMENTARY TO THE GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD **177** (Geneva ICRC 1952).

[203] The use of advanced methods of identification such as **DNA** technology will assist in the identification process, especially in **group** burial situations.

[204] GWS, *supra* note **66,** art. **17,** para. **4.**

would enable family members to visit the clearly marked grave of their relatives. Requiring the parties to report also helps ensure that burial procedures are properly complied with under the circumstances.

The duties to search for wounded, sick, or dead combatants, identify them, and report their condition, are designed to reduce the number of persons missing in action. During the war, the military must carry out these responsibilities and, to do so, they must devote a large number of personnel to POW, medical, and graves registration services. These units also must coordinate with each other to ensure that they conduct accurate identification and reporting. There are a number of practical problems in this area. Identification and reporting problems can be especially difficult when the enemy soldiers come from a different culture and have unfamiliar or easily confused names. It is possible for a wounded enemy soldier to be captured and reported through medical channels, POW channels, and if he should die, through graves registration. If the different systems use different identification numbers (i.e., two POWs with the same name, each receiving a patient number from medical and a different internee serial number from POW processing units), it may be difficult or impossible to reconcile the reports. For these reasons, integrated computer systems must be used to prevent inaccurate or inconsistent reports.[205]

All of the problems related to accurate identification and reporting may never be solved. However, the obligations to search, identify, and report are not static concepts limited to the technology existing at the time that the conventions came into force. The definition of these duties is constantly changing to keep up with current technology. This evolving definition requires the parties to continually update and improve their search, identification, and reporting procedures. The accuracy of identification and reporting can be improved by: the use of DNA technology; the use of bar code identification cards or tags corresponding to uniform patient, POW, and graves registration serial numbers; and the efficient use of computers. This increased efficiency should lead to more timely and accurate reporting, make it easier for the parties to meet their obligations during the course of the war, and reduce the number of combatants listed as missing in action. Finally, states have more than a moral obligation to use improved technology to account for missing and dead combatants; it is a legal obligation imposed by the Conventions and customary international law.

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[205] The United States Army is responsible for accounting for all enemy prisoners of war captured by all branches of the United States Armed Services. To accomplish this mission, the United States Army uses an automated POW Information System 2 (PWIS-2) to maintain a variety of records on each prisoner. *A Practitioner's View, supra* note 54, at 420.

The current law in this area is designed to minimize the number of combatants listed as missing in action. The cease-fire agreement ending hostilities must reflect the continuing obligation of the parties to the conflict to search for, identify, and report the fate of combatants listed as missing in action. In article 8(b) of the 1973 Vietnam Agreement, the parties agreed to:

> help each other get information about those military personnel and foreign civilians of the parties missing in action, to determine the location and take care of the graves of the dead so as to facilitate the exhumation and repatriation of the remains, and to take any such other measures as may be required to get information about those still considered missing in action[206]

Article 10 of the Vietnam Personnel Protocol also established a four-party joint military commission to supervise the implementation of this provision.[207] These provisions reflect the customary law obligations of parties to a conflict to continue their efforts to account for missing combatants after hostilities have ended. It also anticipates the repatriation of the remains of dead service members and foreign civilians.

2. Civilians—The search, identification, and reporting requirements for civilians under the Geneva Conventions are very limited. The persons protected fall within the following basic categories: "(1) *enemy* nationals within the national territories of each of the Parties to the conflict and (2) *the whole* population of occupied territories (excluding nationals of the Occupying Power)."[208]

If the invading military force does not become an occupying power, then Part II of the GC, General Protection of Populations Against Certain Consequences of War, will apply in the invaded area. Article 16 of Part II of the GC provides that "[a]s far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded"[209] As a practical matter, the search and collection of military and civilian wounded and dead from the battlefield may be conducted at the same time. However, the obligation here, "shall facilitate the steps taken," is clearly different from the duty to search for combatants because the civilian authorities, and not the military, have the responsibility

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[206] 1973 Vietnam Agreement, *supra* note 92.

[207] 1973 Vietnam Personnel Protocol, *supra* note 102.

[208] J. PICTET, COMMENTARY TO THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 46 (Geneva ICRC 1958).

[209] GC, *supra* note 66, art. 16.

to care for civilian wounded and dead.[210] The parties' obligation is to assist civilian authorities in their search efforts whenever the military mission permits.

The ability of the military to assist civilian authorities in their search for missing and dead civilians should improve dramatically at the conclusion of hostilities. The primary "military consideration'' during a cease-fire, at the end of hostilities, is the self defense of the unit. The reduced threat under a cease-fire should allow the military to go further in assisting civilian authorities to account for missing and dead civilians. How far this duty goes is unclear, however, it should at least enable the civilian authorities to seek increased access and opportunity to search battlefield areas.

The next step in the accounting process is identification. The only obligation that the military has in identifying the general population is with respect to children[211] and although this is more of a recommendation than an obligation, it reflects the special needs of children, who may become lost in the turmoil and upheaval of war. Under Article **24,** the parties shall "endeavor to arrange for all children under twelve to be identified by the wearing of identity discs, or by some other means."[212]

If the military force becomes an occupying power by establishing effective control over the territory with the intention of holding it, then as an occupying power, it assumes a number of additional obligations. One of these obligations supports the recommendation for identification of children in Article **24** by providing a recording requirement in Article 50 which states that:

> The Occupying Power shall take all necessary steps to facilitate the identification of children and the registration of their parentage. . . . **A** special section of the Bureau set up in accordance with Article 136 shall be responsible for taking all necessary steps to identify children whose identity is in doubt. Particulars of their parents or other near relatives should always be recorded if available.[213]

This provision prevents the occupying power from interfering with the registration of births by the local authorities and requires them to support these activities and augment identification efforts

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[210] J PICTET, COMMENTARY TO THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 135 (Geneva ICRC 1958)

[211] GC, *supra* note [illegible], art. 24.

[212] *Id*

[213] *Id* art. 50

through the work of their Information Bureau. These identification efforts must not to be used against the interests of children and only should be used to prevent children from being permanently separated from their parents. As a special category of innocent persons, any effort that may minimize the effects of war on children should be taken. Proper identification is a simple way to reduce the number of children missing as a result of a conflict.[214]

Because people can become missing in a variety of ways, limiting any discussion of the requirements of humanitarian law that relate to missing persons is difficult. Although most of this section revolves around search, identification, and reporting requirements that are directly related to accounting for missing persons, some actions are so likely to contribute to the problem of missing persons, that they cannot be overlooked.

One of these areas is that of deportations, transfers, and evacuations. Any time that a large group of people is uprooted and moved, whether voluntarily or for reasons of safety, people invariably are lost. Limits on transfers and evacuations are designed to reduce the number of missing people.[215] The protecting power must 'be informed of any transfers and evacuations as soon as they have taken place."[216] This does not require prior notice or a by-name list of those evacuated, but notice provides the protecting power the opportunity to assist the evacuees and ensures that they are properly treated.

Section IV of the GC provides the most extensive obligations and contains the Regulations for the Treatment of Internees. Among the duties of the detaining power to account for internees, is the requirement to establish an information bureau that is responsible for receiving and transmitting information on those "protected persons who are kept in custody for more than two weeks, who are subjected to assigned residence or who are interned."[217] The information gathered "shall be of such a character as to make it possible to identify the protected person exactly and to advise his next of kin quickly."[218] Death certificates also must be used to report information concerning the death of internees.[219] Although the listed infor-

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[214] *See generally* Lima M. Hitch, *International Humanitarian Law and the Rights of the Child: Article 38,* VII J. HUM. RTS. 64 (1989) (discussing protection of children during time of war within the framework of the United Nations Convention on the Rights of the Child).

[215] *See GC, supra* note *66,* art. 49, which requires that evacuated persons must not be evacuated outside of the occupied territory unless "it is impossible to avoid such displacement."

[216] *Id.*

[217] *Id.* art. 136.

[218] *Id.* art. 138, which goes on to state that this information:

mation is rather broad, the requirement to gather information only applies to a very narrow segment of the civilian population. Once the information is gathered, the national Information Bureau is to transmit it to the Central Information Bureau which will forward the information to the person's country of origin, unless it would harm the individual or his relatives.[220]

Currently, humanitarian law only places limited duties on the parties to the conflict to account for missing civilians. State practice also supports the general rule of customary law that the civilian government bears the responsibility to account for missing and dead civilians.[221] Identification of children is in the form of a recommendation and the military's duty to search for civilians is only a conditional obligation to help the civil authorities whenever "military considerations allow."[222] The detaining power's only real identification and reporting requirement in regard to civilians is to account for internees.

These obligations are practical in that a military force that does not assume the role of an occupying power or intern civilians usually will have very little control over the civilians in the combat area. Even though civil services may be severely interrupted during a conflict, the civilian authorities are usually better equipped to account for missing civilians than the military forces in the area. The military forces may have cultural and language differences and may not be as familiar with the surroundings, especially in cities or other built-up areas. Additionally, to improve combat efficiency and minimize casualties and collateral damage, military units are trained to avoid areas with large civilian populations. However, fighting inevitably will cause civilian casualties and missing persons, especially when opposing military forces are collocated with civilians.

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shall include at least his surname, first names, place and date of birth, nationality, last residence and distinguishing characteristics, the first name of the father and the maiden name of the mother, the date, place and nature of the action taken with regard to the individual, the address at which correspondence may be sent to him and the name and address of the person to be informed.

[219] *Id.* art. 129.

[220] *Id.* art. 140.

[221] Article 10(b) of the 1973 Vietnam Personnel Protocol, ***supra*** note 102, states:

With regard to Vietnamese civilian personnel dead or missing in South Viet-Nam, the two South Vietnamese parties shall help each other to obtain information about missing persons, determine the location and take care of the graves of the dead, in a spirit of national reconciliation and concord, in keeping with the people's aspirations.

[222] GC, ***supra*** note 66, art. 16.

The duty to account for missing and dead persons can be based on either the cause of disappearance or the relationship between the parties and the status of the person missing. If the duty to account for missing and dead civilians is based on the cause of death or disappearance, when the cause is undetermined, the military may be required to determine the fate of the individual and report it to the other parties. This method would cause more problems in implementation and potentially could require the military to account for everyone, because it may be difficult to determine whether the death or disappearance was the result of combat operations, illegal activity, or natural causes.

Under the current status-based system of accounting for missing persons, combatants and interned civilians are given the greatest protection. Customary international law does not impose a duty on parties to account for their own citizens or soldiers. Furthermore, classifying certain persons as civilians or combatants may be difficult. Although status-based duties are not always clear, it is still the most logical and practical approach, because it is based on the degree of control or the relationship between the military and the protected person.

The provision of the 1973 Vietnam Agreement requiring a search for missing in action and repatriation of remains, only applied to "foreign civilians."[223] The question of the return of detained Vietnamese civilians was reserved for future negotiation between the two South Vietnamese parties. By contrast, the ceasefire in the 1991 Gulf War required the return of "all Kuwaiti and third country nationals detained by Iraq"[224] This provision also corresponds to the duty to return all persons forcibly transferred from a territory.

3. *Missing and Dead under the 1977 Geneva Protocol I*—Section III of the 1977 Protocol I to the Geneva Conventions revisited the law governing missing and dead persons in international armed conflicts. This section represents an evolution in the law designed to broaden the scope of protection, strengthen the search and reporting requirements, and reduce the number of persons unaccounted for at the end of a war. The source of this protection is found in the recognition of a new right. Unlike the provisions of the Geneva Conventions which are based on the relationship between the rights of the parties to the conflict and the rights of individuals, Article 32 of Protocol I introduces a family right, and provides an interpretative framework for the rest of the section by stating: "[i]n

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[223] *See supra* text accompanying note 206.

[224] U.N. Doc. S/RES/686, para. 2(c) (1991)

the implementation of this section, the activities . . . [of the parties] . . . shall be prompted mainly by the right of the families to know the fate of their relatives."[225]

The scope of this right depends on the definitions of "family" and "relatives." These terms must be understood in their cultural and social environment and may include the extended family. It has been argued that family should include "not only blood relations but also personal and emotional ties."[226] Whether this right was intended to be a moral right or a legal right is unclear.[227] There is no enforcement procedure for the families, who must rely on the activities of the parties and international organizations involved. The duty that parties to Protocol I have to the families is also unclear, because their actions are only to be "prompted mainly by the right of the families."[228] The importance of this right lies in its interpretive value for Section III of Protocol I.[229] Parties to a conflict also have their own right to act to determine the fate of their nationals. However, if there is any conflict between an interpretation that a state believes is in its own interest, and an interpretation that would be in the best interest of the family in finding out the fate of a relative, then the state parties have agreed to act in the interest of the family.[230] A state party may legitimately refuse to divulge information about a relative if it is for security reasons, but it must be more than simply some perceived embarrassment.

In addition to the Article 32 framework, Section III of Protocol I includes Article 33 (missing persons) and Article 34 (remains of the dead).[231] These provisions address a number of gaps in the Conventions and provide protection for some persons who are not protected and additional protection for other protected categories. Article 33 provides, in part, that "[a]s soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing by an adverse Party." The time frame, *ratione temporis,* is the same as the search requirements in the Conventions; it imposes a continual obligation that specifically lasts beyond the conflict or as long as there are missing persons. The reference to "end of hostilities" is

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[225] 1977 Geneva Protocol I, *supra* note 66, art. 32.

[226] YVES SANDOZ ET AL. EDS., COMMENTARY ON THE ADDITIONAL PROTOCOLS 346 (1987).

[227] M. BOTHE, ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS COMMENTARY ON THE TWO 1977 PROTOCOLS TO THE GENEVA CONVENTIONS OF 1949 170-71 (1982).

[228] "It does *not create a legal right* of 'families' to get information from the Parties to the conflict." *Id.* at 171.

[229] *Id.*

[230] *Id.*

[231] 1977 Geneva Protocol I, *supra* note 66, arts. 33, 34.

especially important in that it imposes a definite time from which the parties must begin searching. It also makes search procedures and compliance with this provision a topic that should be considered in drafting the cease-fire agreement and included if the belligerents are parties to Protocol I.

This obligation extends to all victims regardless of their status under the Geneva Conventions.[232] However, to request a search, the party must have a genuine link to the missing person.[233] They also must assist the other party conducting the search by transmitting "all relevant information concerning such persons in order to facilitate such searches."[234]

The important addition for combatants is that this provision allows a party to reconcile the lists of those reported captured or dead, determine which persons remain unaccounted for, and report those individuals as missing to the opposing party, who then has an obligation to search for these individuals. Neither the GWS nor the GWS Sea provide for this type of interactive by-name search requirement. They only impose a one-way reporting requirement for wounded, sick, shipwrecked, and dead. There is no other check or balance that would furnish the accuracy of this type of interactive procedure.

To respond to these requests, every party must have an efficient computer-based information bureau capable of tracking each request, the status of the search, as well as compiling the required information on POWs and the condition of wounded, sick, and shipwrecked combatants. Computer-based reporting procedures also are necessary to forward the information in a timely and efficient manner.

As with the Geneva Conventions, what is meant by a "search" in Article **33** is not explained. It is more than scouring the battlefield looking for anonymous victims. The exchange of names makes it much more personal. However, the obligation to search only

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[232]Article **33** also provides an obligation to search for civilians. It includes "combatants from whom there has been no news, or civilians in occupied territory or enemy territory." ***See*** YVES SANDOZ ET. AL. EDS., ***supra*** note 226, at **351.** The only condition is that they must have been reported missing by the other party. Again, circumstances may not permit a search for civilians during the conflict. However, once the hostilities have ended, the parties must search for all persons who have been reported missing in their area of control.

[233]*Id.* at **350.**

2341977 Geneva Protocol I, ***supra*** note ***66,*** art. **33.** Paragraph **3** of Article **33** establishes procedures for the transmission of requests for information and the forwarding of any response. The exchange of information must either be transmitted via the Protecting Power or the Central Tracing Agency, or if sent directly, a copy of the information must be provided to one of these neutral agencies. Id.

extends as far as practicable.[235] It would include a duty on the part of the military to cooperate with the civilian authorities in the search for missing persons. However, a full-scale investigation, which includes locating witnesses and gathering statements, is beyond the scope of any military force that has not become an occupying power. Civilian authorities must conduct these types of investigations.

Article 33's second paragraph elaborates on the search and reporting requirements of each party by stating:

> In order to facilitate the gathering of information . . . each Party to the conflict shall with respect to people who would not receive more favorable consideration under the Conventions and this Protocol:
>
> (a) record the information specified in Article **138** of the Fourth Convention in respect of such persons who have been detained, imprisoned or otherwise held in captivity for more than two weeks as a result of hostilities or occupation, or who have died during any period of detention.
>
> (b) to the fullest extent possible, facilitate and, if need be, carry out the search for and the recording of information concerning such persons if they have died in other circumstances as a result of hostilities or occupation.[236]

A careful reading of this provision reveals that it is much more limited in scope than it appears. First, it excludes all persons who would receive more favorable treatment under the Conventions and the Protocol. As such, it only establishes a minimum standard for those left unprotected or less protected by the Conventions.

Each subparagraph imposes different obligations on the parties. The persons referred to in subparagraph (a) are not missing; they are either being held by the party or they have died during captivity. Accordingly, there is no duty to search, but a clear duty to gather information about these persons after two weeks in captivity, or at their death, regardless of how long they have been held. Although it uses different language, this provision is better drafted and is intended to cover the same category of protected persons as

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[235] A proposal to limit the search obligation to "as far as practicable" was withdrawn after the Rapporteur of the Working Group argued that this condition was implied. YVES SANDOZ ET AL. EDS., ***supra*** note **226,** at **352.**

[236] 1977 Geneva Protocol I, ***supra*** note 66, art. **33.**

Article 136 of the GC.[237] The type of information to be gathered under this provision is the same as the information required under article 138 of the GC.[238] Because these persons are already in the hands of the party from whom the information is requested, the detaining power can obtain the requested information with relatively little effort or cost.

One possible limitation is the provision that information must be gathered only on those persons held "as a result of hostilities or occupation."[239] This raises the problem of cause-related versus status-based duties. It is much more restrictive than the GC which does not contain a cause-related limitation and requires information to be recorded about all "protected persons who are kept in custody for more than two weeks, who are subjected to assigned residence or who are interned."[240] If the provision "as a result of hostilities or occupation" is given a narrow interpretation, it may exclude a potentially large number of people from protection. For those persons who must rely on Protocol I for protection and are held for reasons determined to be unrelated to the hostilities or occupation, there is no requirement to gather information.[241] Furthermore, this could exclude those held as a result of political offenses or criminal activities unrelated to the conflict. To avoid this problem, the provision "as a result of hostilities or occupation" must be given a broad interpretation to include all but those persons detained for criminal offenses unrelated to the conflict.[242] Regardless of the interpretation given to this provision, it does not affect, and is in addition to, the information gathering requirements of the Geneva Conventions.

For those who are not being held, Article **33,** paragraph 2(b) of Protocol I imposes a limited obligation to search for dead or missing persons. Although it only applies to those who "have died in other circumstances as a result of hostilities or occupation," it also may be interpreted to include those who are presumed dead or are missing because it may be impossible to know the cause of death or disap-

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[237] Persons subject to the information requirements of Article 138 are those protected persons who are "kept in custody for more than two weeks, who are subjected to assigned residence or who are interned." GC, *supra* note 66, art. 136.

[238] *See supra* note 218.

[239] 1977 Geneva Protocol I, *supra* note 66, art. 33.

[240] GC, *supra* note 66, art. 136.

[241] M. BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS COMMENTARY ON THE TWO 1977 PROTOCOLS TO THE GENEVA CONVENTIONS OF 1949, 174 (1982).

[242] This should at least include "civilian internees" as defined in the 1973 Vietnam Personnel Protocol, *supra* note 102, which stated that this term was "understood to mean all persons who having in any way contributed to the political and armed struggle between the two parties, have been arrested for that reason and have been kept in detention by either party during the period of hostilities."

pearance. This duty is primarily an obligation to facilitate, "to the fullest extent possible," the search and recording of information.[243] This search is limited to a requirement to search as far as practicable and for the military, it would include a duty to cooperate with the search efforts of the civilian authorities.

A report by a party under this provision cannot equate to an admission or declaration that the individual was killed as a result of combat activities. The motivation here is to provide a concerned family with information about the fate of their relatives, not with establishing responsibility of the parties for the death of civilians due to combat or occupation.

Paragraph 4 of Article 33 expands search requirements by imposing an obligation on the parties to "endeavor to agree on arrangements for teams to search for, identify, and recover the dead from the battlefield areas." It also provides for joint teams to search for the dead on the battlefield and protection for the members of these teams while "exclusively carrying out these duties."[244]

Although it does not impose an absolute duty, this provision is important in that it demonstrates a desire of the parties to cooperate in an effort to find, identify, and recover dead combatants and civilians. It also is an obligation of the parties that corresponds to the right of families to know the fate of their relatives. It specifically refers to an agreement between the parties and, if hostilities have concluded, these arrangements should be considered in drafting the cease-fire agreement.

Article 34 of Protocol I provides for the care of the remains of the dead and although it does not specifically address accounting for them, it provides that their graves shall be properly marked. It also requires the parties to conclude agreements concerning access to, and maintenance of, gravesites and provisions for the return of the remains.[245] The cease-fire in the 1991 Gulf War is an example of a

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[243] Protocol I, ***supra*** note 66, art. **33.**

[244] *Id.*

[245] Article **34** of Protocol I provides, in part, that:

> As soon as circumstances and the relations between the adverse Parties permit, the High Contracting Parties in whose territories graves and, as the case may be, other locations of the remains of persons who have died as a result of hostilities or during occupation or in detention are situated, shall conclude agreements in order:
>
> (a) to facilitate access to the gravesites by relatives of the deceased and by representatives of official graves registration services and to regulate the practical arrangements for such access;
>
> (b) to protect and maintain such gravesites permanently;

cease-fire requiring the return of the remains of both civilians and military personnel.[246] These arrangements also should be considered when drafting a cease-fire agreement.

The provisions of Protocol I regarding missing and dead persons are not yet customary international law, but they reflect an emerging standard in the obligations to account for missing and dead. Among the important additions contained in these provisions are those that provide for interactive reporting by placing a duty on parties to search and respond to requests from the other party concerning missing and dead and those provisions that provide for the care and repatriation of the dead. Future cease-fire agreements should incorporate these obligations to establish state practice supporting these duties.

The underlying theme for all of the provisions concerning accounting for the missing and dead, is that this is a "team effort" to be carried out by all parties to the conflict, their military forces, and the civilian governments. Primary responsibility is based on the status of the individual and the relationship of the parties to that category. The detaining power of POWs and detained or interned civilians bears the responsibility for reporting the required information about these persons. For persons and remains collected under the provisions protecting the wounded, sick, shipwrecked and dead, the party who takes these individuals into its care is responsible for accounting for them.

Civilians remain the primary responsibility of the civilian authorities with an obligation on the parties to the conflict to assist the civilian government whenever possible. This takes into account the disruption that war has on the ability of the civilian government to carry out its normal functions. Although the parties are not obligated under international law to report or record information on their own nationals, they can assist the process by determining who is missing and reporting the concerns of the family along with any

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(c) to facilitate the return of the remains of the deceased and of personal effects to the home country upon its request or, unless that country objects, upon the request of the next of kin.

There also is a provision allowing the host country to maintain the graves in accordance with its own laws if the home country fails to agree to pay for the maintenance of the gravesites or accept an offer of the country containing the gravesites to facilitate the return of the remains. *Id.* art. 34

[246] At the end of the 1991 Gulf War, the United Nations Security Council demanded that Iraq "return the remains of any deceased Kuwaiti and third country nationals so detained." U.N. Doc. S/RES/686, para. 2(c) (1991). This resolution also required the "return the remains of any deceased personnel of the forces of Kuwait and the Member States cooperating with Kuwait . . . ." *Id.* para. 3(c). It did not include a corresponding obligation for the coalition forces to return Iraqi dead.

particulars that would help in the search for the missing person. Because the parties have a duty to work together in this effort, the cease-fire agreement should address these issues to ensure that all parties to the conflict can carry out their respective duties to provide the families with information about the fate of their relatives.

To comply with these duties, military and civilian graves registration and missing persons organizations must have effective interaction with each other and the Central Tracing Agency of the ICRC. Again, advances in communication and identification technology will continue to change this duty to require upgrades in the parties abilities to search, identify, and report on missing and dead persons.

IV. The Remnants of War: Cleaning up the Battlefield

A. Introduction

The previous section on the victims of war was concerned with addressing the needs of the living; restoring their lives and repairing the damage that war brings to all of the people who are touched by it. This section is concerned with a different victim: the environment. Protecting the environment under international humanitarian law finds its basis in the law governing the means and methods of warfare. Because this article focuses on concluding hostilities, only those means and methods with effects lasting beyond the conclusion of the conflict will be discussed.

This subject can be divided into two basic areas. The first area addresses weapons that remain a threat to the environment after the conclusion of the war (i.e., unexploded ordnance, submarine mines, and landmines) and unnecessary damage caused during the conflict with lasting effects on the environment. The threat of these weapons is that they retain their destructive power beyond the end of the hostilities until they explode or they are deactivated or removed. The other area, environmental damage, relates to unnecessary damage to the environment in violation of the law of war. The different regimes governing each of these areas will be discussed along with the obligations to include them in the cease-fire agreement.

B. Unexploded Ordnance

Unexploded ordnance are either weapons that failed to explode after firing-contrary to their design—or weapons abandoned on the battlefield. Unexploded ordnance can be artillery shells, hand

grenades, aerial bombs, or rockets—weapons that make up a vital part of every country's military arsenal. Their effectiveness as military weapons makes regulating their use difficult at best. Designing a fail-safe method of locating and deactivating them also is impractical given today's technology. Even if there is a design cure to ensure that weapons which fail to explode will deactivate automatically, it is illogical to expect it to be 100% effective because a large number of the unexploded ordnance that exists on former battlefields is there because it did not explode in accordance with its original design. Because technology has not yet provided an effective cure and this type of ordnance is too effective to be banned by an international consensus, this discussion will focus on responsibility for the removal of unexploded ordnance from the former battlefield.

The problem of unexploded ordnance is immense. Since 1946, France's Department du Déminage has collected and destroyed more than eighteen million artillery shells, ten million grenades, six hundred thousand aerial bombs, and six hundred thousand underwater mines left from World Wars I and II.[247] In that time, six hundred and thirty demineurs have been killed in the line of duty. Due to the danger, the French government cordoned off nearly sixteen million acres of land near Verdun in November 1918 leaving uncollected dead among the unexploded bombs and grenades.[248] Much of this area remains cordoned off. Today, over seventy-five years after World War I, it is estimated that twelve million unexploded shells still lie in the ground near Verdun.[249]

The practice of the French government is indicative of customary international law in this area. Unlike the law applicable to submarine mines or landmines, there is no specific international legal regime governing the removal of unexploded ordnance. **As** a result, the problem remains a domestic concern with each state responsible for removing unexploded ordnance from the battlefields located within its territory. If the cease-fire agreement is silent, the obligation to remove unexploded ordnance will remain with the host state.

The law limits the type of ordnance used. Article **22** of the 1907 Hague Regulations states that "[tlhe right of belligerents to adopt means of injuring the enemy is not unlimited."[250] This provision is the foundation for the regulation of means and methods of

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[247] Donovan Webster, *The Soldiers Moved on. The War Moved on. The Bombs Stayed.*, SMITHSONIAN, "Feb. 1994, at 26, 28.

[248] *Id.*

[249] *Id.*

[250] 1907 Hague Regulations, *supra* note 9, art. **22.**

warfare and is declaratory of customary international law.[251] The **1925** Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare expands these limits by prohibiting the use of gas and bacteriological warfare.[252] This Protocol reflects customary international law at least to the extent that it prohibits the first use of lethal chemical and biological weapons.[253] With the exception of the Japanese use of gas in China between **1937** and **1945,** this prohibition was observed during World War II, largely due to a fear of retaliation in kind.[254] The result is that the chemical munitions found in France are from World War I and only amount to thirty of the nine hundred tons of bombs the Department du Déminage finds each year.[255] Although this is a tremendous amount, if chemical weapons had been extensively used in World War II, the clean-up problem would be much greater because these shells leak toxic gas and are more difficult to destroy than conventional explosives.[256]

Any state who violates its obligations under customary international law through the first use of lethal chemical or biological weapons, should be liable for the damage caused by the violation and responsible for cleaning up the mess created by the use of these prohibited weapons. A state who retaliates in kind to the first use of gas or bacteriological warfare would not have the same liability since this option is preserved under the law of war and would not be an illegal use of these weapons.[257]

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[251] James P. Terry, *The Environment and the* ***Laws*** *of War: The Impact of Desert Storm,* NAVAL WAR C. REV., vol. XLV, no. **1,** Winter 1992, **61,** 62 (citing International Military Tribunal (Nuremberg)); *"Judgement and Sentence,"* 41 *AM.* **J.** OF INT'L L. 172 (1947).

[252] The 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, XCIV L.N.T.S. (1929) 65-74, *reprinted in* ROBERTS & GUELFF, *supra* note 9, at 139.

[253] ROBERTS & GUELFF, *supra* note 9, at 139.

[254] *Id.* at 138.

[255] Webster, *supra* note 247, at 26, 32.

[256] *Id.* at 29.

[257] State parties who have ratified the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare without reservation are bound by the prohibition on any use of gas or bacteriological warfare in their relations with any other party who has ratified the Protocol without reservation. The United States ratified this Protocol on April 10, 1975 with the following reservation:

> The said Protocol shall cease to be binding on the Government of the United States with respect to the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, in regard to an enemy state if such state or any of its allies fails to respect the prohibitions laid down in the Protocol.

ROBERTS & GUELFF, *supra* note 9, at 144-46. For other state parties with similar reservations based on reciprocity and states who are not parties, only the first use of these weapons would be a violation of the law of war.

C. Submarine Mines

Unlike unexploded ordnance—which relies on general rules applicable to the law of armed conflict—under customary international law a specific obligation exists to remove submarine mines at the end of a war. Article 5 of the 1907 Hague Convention VIII Relative to the Laying of Submarine Contact Mines provides:

> At the close of the war, the contracting Powers undertake to do their utmost to remove the mines which they have laid, each Power removing its own mines.
>
> As regards anchored automatic contact mines laid by one of the belligerents off the coast of the other, their position must be notified to the other party by the Power which laid them, and each Power must proceed with the least possible delay to remove the mines in its own waters.[258]

Although almost ninety years old, this treaty places a much higher and well-defined duty on states to remove submarine mines than any Convention relating to the use of landmines before or since. The obligation to "undertake to do their utmost to remove the mines" requires the parties to conduct thorough mine removal operations with the best equipment available. This provision also places the responsibility for removal on the party laying the mines, with an exception that takes into account the sovereignty of the coastal state.[259]

The second paragraph of Article 5 requires the parties to provide notice of all mines laid "off the coast" of the other party. Although "off the coast" is not defined, it should be interpreted as the territorial sea of the coastal state. It also does not anticipate the laying of submarine mines within internal waters and may it be argued that "off the coast" specifically excludes internal waters. However, it should be interpreted to require the party that laid the mines to remove all mines it laid on the high seas and report the location of any mines that it laid within the territorial sea or internal waters of the coastal state. The party receiving notice of mines located within its territory must remove them as soon as possible.

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[258] Hague Convention Relative to the Laying of Automatic Submarine Contact Mines of 18 October 1907, 36 Stat. 2332, T.S. 541, 1 Bevans 669 [hereinafter Hague VIII], *reprinted in* ROBERTS & GUELFF, *supra* note 9, at 86.

[259] A Technical Delegate to the Hague Peace Conferences, James B. Scott, stated that "If, however, mines have been laid by one or other of the belligerents off the enemy's coast it seems excessive to require that each belligerent should remove the mines placed by it." JAMES B. SCOTT, THE HAGUE PEACE CONFERENCES OF 1899 AND 1907, 548 (1909).

If the coastal state is a developing nation, removing the mines laid in its territorial sea and internal waters may place a severe economic burden on the state. It is clear that responsibility for removing mines placed on the high seas is on the party laying them. The coastal state may argue that the obligation of states to "undertake to remove the mines which they have laid" requires the party laying the mines to pay for removal of mines it placed within the territorial waters of the coastal state and the duty of the coastal state "to remove the mines in its own waters" does not preclude a claim for the expenses incurred during removal operations.

If the conflict being terminated by the cease-fire agreement involved the use of submarine mines, the agreement must contain a provision requiring the parties to remove any mines that they placed on the high seas and report the location of mines they laid in the territorial waters of the coastal state. Additionally, the parties may agree to cooperate in removal of submarine mines.

The Agreement Ending the War and Restoring Peace in Vietnam required the removal of waterborne mines.[260] It also contained a Protocol Concerning the Removal, Permanent Deactivation, or Destruction of Mines in the Territorial Waters, Ports, Harbors, and Waterways of the Democratic Republic of Vietnam.[261] This Protocol required the United States to remove or destroy all mines that it had placed in the territorial waters of the Democratic Republic of Vietnam.[262] If they could not be removed or destroyed, the United States was required to permanently deactivate them and mark their location.[263] This Protocol required cooperation between the parties with the United States providing notice and plans for its mine clearance operations and North Vietnam notifying the United States of any potential hazards to mine removal operations.[264] While carrying out these operations, United States personnel were required to respect the sovereignty of the Democratic Republic of Vietnam, but they were immune from their jurisdiction.[265] North Vietnam was required to ensure the safety of the United States personnel for the duration of the mine clearance process.[266]

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[260] 1973 Vietnam Agreement, supra note 92, art. 2.

[261] Protocol to the Agreement on Ending the War and Restoring Peace in Vietnam Concerning the Removal, Permanent Deactivation, or Destruction of Mines in the Territorial Waters, Ports, Harbors, and Waterways of the Democratic Republic of Vietnam, Jan. 27, 1973, 24 U.S.T. 115.

[262] *Id.* arts. 1,2.

[263] *Id.* art. 2.

[264] *Id.* art. 4.

[265] *Id.* art. 7.

[266] *Id.*

This protocol went beyond the obligations of customary law which would only require the United States to notify North Vietnam of the position of the mines laid off the coast, and North Vietnam would be required to "remove the mines in its own waters."[267] This reflects the primary concern of international law with the sovereignty of states. A party cannot create a right to enter the territory of another state after the war to remove mines simply by laying mines during the war. The law may require cooperation, but the state exercising sovereignty over the territory retains the right to refuse entry to the personnel of the other party. In the Vietnam Protocol, the United States agreed to do more than it was required under international law by actually removing mines located within North Vietnam's territorial and internal waters. It is an excellent example of cooperation in the removal of mines, but this is an obligation agreed upon by the parties, not a legal requirement.

A provision in a cease-fire that conforms to the reporting obligations of customary international law is paragraph 3(d) of Security Council Resolution 686 which requires Iraq to "provide all information and assistance in identifying Iraqi mines . . . in Kuwait . . . and in the adjacent waters."[268] It imposes a duty on Iraq to report the location of all mines, whether they are in the water or on land. However, it does not require Iraq to remove any mines.

Although there may be some problems of interpretation, customary international law requires the removal of submarine mines at the conclusion of hostilities. The party laying the mines must remove them unless they are within the territory of the coastal state. If they are in the territory of another state, the party who laid the submarine mines must notify the coastal state of the location of the mines and the coastal state must remove the mines from its own waters.

D. Landmines

Unfortunately, the law governing the subject of landmines is not as clear. A landmine is an area denial weapon that is designed to remain hidden, to lie in wait for its target. Their continued use and the failure of the international community to impose effective restrictions is an indication of their military usefulness and prevalence.[269]

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[267] Hague VIII, *supra* note 258, art. 5.

[268] U.N. Doc. S/RES/686 (1991).

[269] The United States took a leading role in the effort to curb the use of landmines by enacting the Landmines Moratorium Act in 1993 which imposed a one-year ban on the sale, export, and transfer abroad of landmines. THE ARMS PROJECT OF HUMAN RIGHTS WATCH AND PHYSICIANS FOR HUMAN RIGHTS, LANDMINES: A DEADLY LEGACY 319 (1993) [hereinafter DEADLY LEGACY]; *see also* Janet E. Lord, *Legal Restraints in the Use of Landmines: Humanitarian and Environmental Crisis*, 25 CAL. W. INT'L L.J. 311 (Spring 1995) (providing an overview of the global landmine problem and efforts to restrict landmines).

The failure of belligerents to remove the mines laid during past conflicts is apparent from today's global dilemma. It has been estimated that there are approximately eighty-five million uncleared landmines in fifty-six countries.[270] Another expert has calculated this number to be as high as 200 million.[271] It is impossible to furnish an accurate estimate of the number or location of all mines because they are designed to remain hidden and may be installed by any number of individuals or groups through a variety of different methods. The problem is enormous, and the solution is difficult, expensive, and imperfect at best.

To consider a minefield cleared, the area must meet "a clearance rate of over 99%, and preferably over 99.9%."[272] A "cleared" minefield is not a safe area. For example, there are up to 5000 mines in a one kilometer linear minefield in Kuwait; a 99% clearance of that field will leave approximately 50 mines.[273] Currently, demining technology has not provided a mechanical method of demining that will provide a satisfactory clearance rate, forcing clearance operations to rely on manual methods. Manual demining is dangerous, slow, and expensive. The ICRC estimates that, by continuing to use twenty-seven United Nations teams clearing mines at the rate of thirty square kilometers a year, it would take 4300 years to clear the mines from Afghanistan.[274]

Removal also is costly. While antipersonnel mines can be purchased for as little as three dollars per mine and antitank mines at less than seventy-five dollars each,[275] the detection and removal of a live mine by a demining contractor costs approximately $1000.[276]

The cold statistical facts or estimates of the experts do not fully define the scope of the problem, nor do they account for the personal tragedy of the more than 150 people who are killed or maimed every week by the mines that are left behind following wars.[277] Additionally, they do not take into account the number of refugees who have been forced to flee their homes and are unable to return.

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[270] Bureau of Political-Military Affairs, United States Dep't of State, Pub. No. 10098, HIDDEN KILLERS: THE GLOBAL PROBLEM WITH UNCLEARED LANDMINES, 33 (July 1993) [hereinafter HIDDEN KILLERS].

[271] Patrick M. Blagden, *Summary of United Nations Demining, in* SYMPOSIUM ON ANTI-PERSONNEL MINES 117 (International Committee of the Red Cross, Montrew, Apr. 21-23, 1993) [hereinafter SYMPOSIUM].

[272] *Id.* at 118.

[273] *Id.*

[274] Media Natura, *The Deadly Legacy: Report on Western Views of Landmines and Ways of Restricting their Indiscriminate Use, in* SYMPOSIUM, *supra* note 271, at 271, 277.

[275] HIDDEN KILLERS, *supra* note 270, at 2.

[276] *Id.* at 10.

[277] *Id.* at 5.

Customary international law has not yet provided an effective solution to the problems presented by landmines. Each conflict presents different duties on the parties based on their connection to the territory in which the mines were placed. In other words, sovereignty continues to limit the legal obligations of the parties to remove landmines.[278] The law will not require a party to allow another party to enter its territory after a conflict for the purpose of removing the mines it laid. The state in which the mines are located may want to exercise its right to refuse the entry of foreign mine clearance personnel for political reasons. However, it is in the state's own best interest to remove the mines which endanger the lives of its citizens, deny access to mined areas, and threaten economic development. The best solution to the problem is to resolve the issues of removal, cooperation, and responsibility in the cease-fire agreement.[279]

The international law regime on landmines lacks the history of the law regarding submarine mines. Landmines were specifically addressed in the Conventional Weapons Convention in its optional Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Mines Protocol).[280] The Mines Protocol applies to a wide spectrum of munitions used on land and also includes mines used to "interdict beaches, waterway crossings or river crossings."[281] It is intended to provide reasonable protection

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[278]This condition has been summarized as follows:

> The legal problems raised by such situations differ from case to case. If a belligerent has deployed the material for the defense of its own territory, that state normally has the greatest interest in removing the remnants and will regard this task as an internal measure. If the material was brought there by the enemy, or if the conflict took place in the territory of a third country or a former colony that has since gained independence, it has to be decided which state is responsible for removing the remnants or deactivating them, which form of cooperation should be requested or expected from the state that emplaced the devices, and whether responsibility or liability exists for the direct or indirect damage they have caused.

Karl J. Partsch, *Remnants of War as a Legal Problem in the Light of the Libyan Case*, *78* AM. J. INT'L L. 386, 386 (1984).

[279]*Id.*

[280]Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Inurious or to have Indiscriminate Effects, with annexed Protocols, *opened for signature* April 10, 1981, *reprinted in* ROBERTS & GUELFF, *supra* note 9, at 473. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices [hereinafter Mines Protocol] *reprinted in* ROBERTS & GUELFF, *supra* note 9, at 479.

[281]Article 1 of the Mines Protocol, *supra* note 280, states that the Protocol relates to mines, booby-traps, and other devices. These items are defined in article *2* which provides, in part that:

for civilians and proclaims: "All feasible precautions shall he taken to protect civilians. . . . Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations."[282]

At the conclusion of hostilities, military considerations decrease in importance and humanitarian issues become a priority. It also may be impracticable or impossible to begin mine clearance operations until after the fighting has subsided or ceased. The Mines Protocol imposes a number of obligations or steps at the end of hostilities. These steps include requirements for the identification, recording, and removal of minefields.

The strictest obligations of the Mines Protocol provide protection for any United Nations force or mission. If requested by the United Nations force, the parties to the conflict are required "to remove or render harmless all mines or booby-traps in that area."[283] The parties also must take all necessary measures to protect the United Nations personnel and make available any information on the location of mines.[284]

In other circumstances, the requirements are less demanding. The parties to a conflict have an obligation to include an exchange of information about the location of minefields in cease-fire agreements.[285] Exchanging information may not be as effective as a requirement to remove the mines, but it provides a starting point for cleaning up the battlefield.

To have a meaningful exchange of information at the end of hostilities, the parties must record information regarding the loca-

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1. "Mine" means any munition placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle, and "remotely delivered mine" means any mine so defined delivered by artillery, rocket, mortar or similar means or dropped from an aircraft.

2. "Booby-trap" means any device or material which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act.

3. "Other devices" means manually-emplaced munitions and other devices designed to kill, injure or damage and which are actuated by remote control or automatically after a lapse of time.

[282] *Id.* art **3.**

[283] *Id.* art. *8.*

[284] *Id.*

[285] Article 7.3(c) states that the parties shall: "whenever possible, by mutual agreement, provide for the release of information concerning the location of minefields, mines and booby-traps, particularly in agreements governing the cessation of hostilities." *Id.*

tion of mines at the time of emplacement.[286] The Mines Protocol contains a duty to make and retain records of the location of mines and booby-traps.[287] However, the duty to record varies. It is mandatory for "all pre-planned minefields" and "all areas with large-scale and pre-planned use of booby-traps."[288] For "all other minefields, mines and booby-traps," the parties "shall endeavor to ensure" that their location is recorded.[289]

A problem with this provision is that it does not define "pre-planned" nor is there a size requirement to define a minefield. A "pre-planned" minefield has been defined as "one for which a detailed military plan exists considerably in advance of the proposed date of execution."[290] This would not include a remotely deliverable minefield[291] which usually is used in an area that the party does not control. Any minefield emplaced in a combat emergency does not have to be recorded. Furthermore, it has been argued that "virtually all preplanned minefields will be those for which detailed military plans have been written long before the outbreak of hostilities."[292] This interpretation is probably too restrictive, but illustrates the narrow scope of this provision.

The detail of recording also poses a problem. There is no requirement to record the type of mines, location of each mine in the minefield, or the pattern in which the mines were placed.[293] The only binding obligation is to record the location of preplanned minefields.[294] Additional guidelines on recording are set forth in a non-binding Technical Annex to the Land Mines Protocol.[295]

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[286]The obligation to record and maintain these records arises at the time of emplacement and continues throughout the war. It cannot be delayed until the conclusion of hostilities. Elmar Rauch, *The Protection of the Civilian Population in International Armed Conflicts and the Use of Lundmines*, 24 GERMAN Y.B. INT'L L. 262, 286 (1981).

[287]Article 2.6 of the Mines Protocol, *supra* note 280, defines "recording" as "a physical, administrative and technical operation designed to obtain, for the purpose of registration in the official records, all available information facilitating the location of minefields, mines and booby-traps."

[288]*Id.* art. 7.1.

[289]*Id.* art. 7.2.

[290]DEADLY LEGACY, *supra* note 269, (quoting Burris M. Carnahan, *The Law of Land Mine Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons*, 105 MIL. L. REV. 73, 84 (1984)).

[291]Remotely delivered mines, also known as "scatterables," are delivered by aircraft, artillery, or rockets. *Id* at 10.

[292]*See* Carnahan, *supra* note 290, at 84.

[293]*Id.*

[294]*Id.*

[295]The Technical Annex states:

> Whenever an obligation for the recording of the location of minefields, mines and booby-traps arises under the Protocol, the following guidelines shall be taken into account.

There is an argument that a failure to make proper records is a failure to take feasible precautions to protect the civilian population from the effects of these weapons. "Feasible precautions" depend on the circumstances and military exigencies may cause units to construct hasty minefields without recording.

The duty to identify or record the location of mines and booby-traps is only the first step. The parties also must keep these records and report or exchange this information so that additional steps may be taken to protect innocent civilians from mines and booby-traps. Article **7.3** provides these steps, which require that the parties retain all records and:

> (a) immediately after the cessation of active hostilities:
>
> (i) take all necessary and appropriate measures, including the use of such records, to protect civilians from the effects of minefields, mines and booby-traps; and either
>
> (ii) in cases where the forces of neither party are in the territory of the adverse party, make available to each other and to the Secretary-General of the United Nations all information in their possession concerning the location of minefields, mines and booby-traps in the territory of the adverse party; or
>
> (iii) once complete withdrawal of the forces of the parties from the territory of the adverse party has taken place, make available to the adverse party and to the Secretary-General of the United Nations all information in their possession concerning the location of minefields, mines and booby-traps in the territory of the adverse party;[296]

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1. With regard to pre-planned minefields and large-scale and pre-planned use of booby traps:

(a) maps, diagrams or other records should be made in such a way as to indicate the extent of the minefield or booby-trapped area; and

(b) the location of the minefield or booby-trapped area should be specified by relation to the co-ordinates of a single reference point and by the estimated dimensions of the area containing mines and booby-traps in relation to that single reference point.

2. With regard to the other minefields, mines and booby-traps laid or placed in position:

In so far as possible, the relevant information specific in paragraph 1 should be recorded so as to enable the areas containing minefields, mines and boobytraps to be identified.

Guidelines on Recording, Technical Annex to the Land Mines Protocol, *reprinted in* Carnahan, *supra* note **290,** at **84-85.**

[296] Mines Protocol, *supra* note 280, art. **7.3.**

The obligation to take "all necessary and appropriate measures" requires the parties to clearly mark and fence off minefields to protect civilians. This should be done immediately, with the military units marking any minefields before withdrawing to any agreed on cease-fire delimitation.

Notification of the Secretary General of the United Nations, in the rare situations where neither party occupies the territory, ensures that minefields are not abandoned. In cases when a party gains possession of the territory after the withdrawal of the adverse party, notifying both the United Nations and the party controlling the minefield provides an additional guarantee that the minefields are properly supervised to prevent unauthorized entry.

The next step is the removal of the mines. The solution supplied by the Mines Protocol is a rather hollow obligation:

> After the cessation of active hostilities, the parties shall endeavor to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of information and technical and material assistance — including, in appropriate circumstances, joint operations — necessary to remove or otherwise render ineffective minefields, mines and booby-traps placed in position during the conflict.[297]

This provision imposes a critical time factor. Efforts to clear minefields must be made as soon as possible after the end of hostilities because the minefield maps and charts are more accurate, and the individuals or units that laid the mines are more likely to be able to provide additional information that will assist in clearance operations.

In addition to the Mines Protocol, there are other possible sources in this area. World opinion on this issue has been expressed a number of times. In 1983, the United Nations General Assembly, in a resolution on the remnants of war, stated that it was: "[*c*]*onvinced* that the responsibility for the removal of the remnants of war should be borne by the countries that planted them."[298]

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[297] *Id.* art. 9.

[298] G.A. Res. 381162 (1983). In this resolution the General Assembly continues by:

> *Recognizing* that the presence of the material remnants of war, particularly mines, in the territories of developing countries seriously impedes their development efforts and causes loss of life and property . . .
>
> 3. *Reiterates its support* of the just demands of the developing countries affected by the implantation of mines and the presence of other remnants of war in their territories for full compensation from the States responsible for those remnants;

Placing the burden of removal on the country that laid the mines is consistent with the 1907 Hague Convention VIII Relating to the Laying of Automatic Submarine Contact Mines. Although it focuses primarily on landmines, the term "remnants of war," as used here, also refers to land, sea and river mines, booby-traps and dud munitions.[299]

In spite of these resolutions, customary international law does not currently place the primary responsibility for removal on the party that emplaced the mines. Although it may be difficult in some situations to determine which side installed the mines, that party should have the primary responsibility for removal and joint operations should be conducted for those areas in which the parties are unable to discern responsibility. However, because of the tremendous expense of mine clearance operations, disputes over responsibility could lead to delayed and ineffective clearance operations.

The Mines Protocol has not led to an improvement in the removal of mines following conflicts even though it has been in force, for most of the state parties, for over ten years. A number of sources have heavily criticized it, with some evaluations especially scathing.[300] It also has been argued that the Mines Protocol supports the proposition that "the responsibility for the removal of land mines rests with the state exercising territorial sovereignty. The belligerent that laid the mines is only bound to endeavor to reach agreement on certain forms of cooperation."[301]

The ineffectiveness of the Mines Protocol is caused by a number of broad loopholes, a lack of detail, and weak obligations. As a result, parties to the Mines Protocol may assert compliance without reducing the number of mines that remain at the end of a conflict or improving their recording provisions. The practical effect is that the host state is left with the obligation to clear minefields, often with-

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Id. See also GA Resolutions regarding Remnants of War: G.A. Res. 3435(XXX) (1975); G.A. Res. 35/71 (1980), G.A. Res. 351188 (1981); G.A. Res. 37/215 (1982).

[299] 1983 YEARBOOK OF THE UNITED NATIONS 786 (1983).

[300] Kenneth Anderson, Director, Arms Project Human Rights Watch, has stated: "The Landmines Protocol has been a nearly complete failure with respect to controlling the use of mines, recording their emplacement and removal; indeed there is no known internal conflict where maps of any kind have been maintained in accordance with Protocol procedures or any more rudimentary way." He takes the position that general principles of the customary law of war barring the indiscriminate use of weapons provide greater protection than the specific terms of the Mines Protocol and argues that its ineffectiveness is based in part, to its failure to take into account new technology, such as the use of remotely deliverable mines and new forms of use in low-intensity conflict. Kenneth Anderson, *Overview of the Problem of Anti-Personnel Mine, in* SYMPOSIUM, *supra* note 271, at 13, 14-15.

[301] Karl J. Partsch, *Remnants of War as a Legal Problem in the Light of the Libya Case, 78* AM. J. INT'L L. 386, 391 (1984).

out the assistance of accurate records or financial assistance. This is extremely expensive and most war-torn countries are financially unable to afford their own clearance operations. A recent example of the cost of these operations is Kuwait's decision to award $700 million to contractors from eight different nations to clear almost seven million mines laid by the Iraqis.[302] Given the number of mines and the flat open spaces of the desert, this is relatively cheap; mine clearance is more expensive and less effective in rough, rocky, or heavily overgrown terrain.

The Gulf War cease-fire provision simply provided that Iraq:

> Provide all information and assistance in identifying Iraqi mines, booby traps and other explosives as well as chemical and biological weapons and material in Kuwait, in areas of Iraq where forces of Member States cooperating with Kuwait pursuant to resolution 678 (1990) are present temporarily, and in the adjacent waters;[303]

Although it added chemical and biological weapons, it was in compliance with the Mines Protocol and only required Iraq to provide information and assist in locating the mines that they laid. It did not require them to remove those mines. However, Iraq, by accepting Resolution 686, admitted "liability under international law for any loss, damage, or injury arising . . . as a result of the invasion and illegal occupation of Kuwait by Iraq."[304] This provision should allow Kuwait to ultimately recover the cost of demining operations from Iraq.

A protocol to the agreement ending the war in Vietnam provided that:

> (a) Within fifteen days after the cease-fire comes into effect, each party shall do its utmost to complete the removal or deactivation of all demolition objects, minefields, traps, obstacles or other dangerous objects placed previously, so as not to hamper the population's movement and work, in the first place on waterways, roads and railroads in South Vietnam. Those mines which cannot be removed or deactivated within that time shall be clearly marked and must be removed or deactivated as soon as possible.
>
> (b) Emplacement of mines is prohibited, except as a

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[302] HIDDEN KILLERS, *supra* note *270* at 36. ***See also*** DEADLY LEGACY, *supra* note 269, at 249-51 (describing other mine clearance operations).

[303] U.N. Doc. S/RES/686 (1991).

[304] *Id.*

> defensive measure around the edges of military installations in places where they do not hamper the population's movement and work, and movement on waterways, roads and railroads. Mines and other obstacles already in place at the edges of military installations may remain in place if they are in places where they do not hamper the population's movement and work, and movement on waterways, roads and railroads.[305]

This agreement goes farther than customary international law and places an affirmative duty on the parties to remove mines and other hazards or mark them if they cannot be removed within fifteen days. This is a much heavier burden than the obligation to provide information about the location of the mines that is found in the Mines Protocol. It also prioritizes the removal operations to protect the population and lines of communication. Given the length of the conflict in Vietnam, it is unrealistic to expect that all mines could be removed or marked within fifteen days. However, for those mines that the parties were unable to remove or deactivate within that time, the continuing obligation to remove or deactivate them as soon as possible will substantially reduce the number of mines left as a result of the conflict.

Customary international law does not provide adequate protection from the use of landmines in armed conflict. Mines remain an effective weapon of warfare and efforts to control them are complicated. Binding obligations to remove all mines that a party lays during a conflict would substantially limit the use of an effective area denial weapon. If the law imposed a binding obligation to remove all mines laid, Iraq would have had mine removal personnel in Kuwait for a considerable period of time after the war. Because it suffered so much during the Iraqi occupation, this may not be acceptable to Kuwait. The solution in the Gulf War was to require information and assistance from Iraq. Kuwait would be responsible for the mine removal operations and Iraq would be liable for damages, including the cost of these operations. This was probably the best solution under the circumstances. Every situation is different, however, and in some cases, agreements that require the party who laid the mines to remove them may be the best answer. The law may not be able to provide an adequate solution for every situation and settle the parties concerns with sovereignty and state responsibility.

Although the Mines Protocol does not go as far as many would

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[305] Protocol to the Agreement Ending the War and Restoring Peace in Vietnam Concerning the Cease-fire in South Vietnam and the Joint Military Commissions, Jan. 27, 1973, art. 5, 24 U.S.T. 148, T.I.A.S. No. 7542.

like, at least a regime has emerged requiring international cooperation in the removal of mines. The International Committee of the Red Cross recently sponsored a series of meetings of government experts in preparation for the 1995 Review Conference of the Certain Conventional Weapons Convention.[306] The Review Conference is continuing efforts to strengthen a number of provisions in the Mines Protocol, some of which may have an impact on the law relating to cease-fire agreements.[307]

The balance between the military effectiveness of mines and the environmental and humanitarian damage that they cause will continue to shape the debate. Regional and nongovernmental organizations also will have a significant impact in the push for forceful regulation of landmines.[308] The need for tighter controls will increase with each trouble spot or battleground adding to the problem. Stricter obligations to record and mark the location of mines should be the focus of new regulations to ensure that the party faced with the task of removal has an easier job. Solutions to the

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Wnternational Committee of the Red Cross, 298 INT'L REV. OF THE RED CROSS, Jan.-Feb. 1994, at 65.

[307]The formal Review Conference of the Certain Conventional Weapons Conference met in Vienna from 25 September to 13 October 1995. The Review Conference failed to agree on a revised Mines Protocol and recessed its Deliberations. The Review Conference will resume its work in January 1996 with a final Review Conference planned for April 1996. The President's Text of the Review Conference included the latest proposal to revise Article 9 with a new Article 10 which states:

> 1. Without delay after the cessation of active hostilities all minefields. mined areas, mines, booby-traps and other devices shall be cleared, removed, destroyed or maintained in accordance with Article 3 and paragraph 2 of Article 5 of this Protocol.
>
> 2. Each High Contracting Party bears such responsibility with respect to minefields, mined areas, booby-traps and other devices in areas under its control.
>
> 3. With respect to minefields, mined areas, mines, booby-traps and other devices laid by a party in areas over which it no longer exercises control, such party shall provide to the responsible party pursuant to paragraph 2 above, to the extent permitted by such party, technical and material assistance necessary to fulfil such responsibility.
>
> 4. At all times necessary, the parties shall endeavor to reach agreement, both among themselves and, where appropriate, with other States and with international organizations on the provision of technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations necessary to fulfil such responsibilities.

President's Text to the Review Conference of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects. U.N. Doc. CCW/CONF.I/WP.4 (1995).

[308]Some of the regional organizations and nongovernmental organizations involved with landmine controls are: Organization of American States; the Economic Community of West African States; the ICRC; Human Rights Watch; Medicins Sans Frontieres; Vietnam Veterans of America Foundation; Handicap International; and Physicians for Human Rights.

problems of removal and liability remain issues that should be settled between the parties in the cease-fire agreement.

Although the current law may not require parties to include binding obligations for the removal of landmines in their cease-fire agreement, it requires them to insert a provision requiring the exchange of information concerning the location of the mines, marking of minefields, and cooperation in removal efforts.

E. Environmental Damage

Protection of the environment, as an area under international law, has seen a rapid growth in recent years. As a result of the tremendous damage that the Iraqi forces caused during the 1991 Gulf War, concern for war-related environmental damage became a focal point for legal scholars. The debate has centered around whether the law of war provides adequate protection for the environment, with some scholars arguing that there is a need for a Fifth Geneva Convention for the protection of the environment,[309] and others asserting that the law is adequate, but the failure is in a lack of enforcement for violations of the law of war.[310]

One expert has noted that "[i]nherent within the law of armed conflict is the understanding that even the most sophisticated and precise weapon systems will exact a price upon the environment."[311] Although war is destructive, the law places limits on the conduct of war requiring military operations to focus on legitimate military objectives. The United Nations General Assembly recently recognized this principle by stating that "destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law."[312] The legal underpinning for this prohibition on unnecessary destruction is provided for in the existing law of armed conflict.

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[309] Marc A. Ross, *Environmental Warfare and the Persian Gulf War: Possible Remedies to Combat Intentional Destruction of the Environment,* 10:3 DICKINSON J. INT'L 515, 539 (Spring 1992). *See also* R.G. Tarasofsky, *Legal Protection of the Environment During International Armed Conflict,* 24 NETH. Y.B. INT'L L. 17, 78-79 (1993).

[310] Terry, *supra* note 251, at 61. *See also* Walter G. Sharp, Sr., *The Effective Deterrence of Environmental Damage During Armed Conflict: A Case Analysis of the Persian Gulf War,* 137 MIL. L. REV., 1 (1992); John H. McNeill, *Protection of the Environment in Times of Armed Conflict: Environmental Protection in Military Practice, 6* HAGUE Y.B. INT'L L. 75 (1993).

[311] Terry, *supra* note 251, at 61.

[312] UN Doc. A/RES/47/37 (1993). This Resolution and its annexed memoranda are thoroughly discussed in McNeill, *supra* note 310, at 76-80.

The 1907 Hague Regulations contain a number of articles that provide a legal basis for the protection of the environment during armed conflict. Article 22 states that "the right of belligerents to adopt means of injuring the enemy is not unlimited."[313] Article 23(g) declares that is especially forbidden "[t]o destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."[314] Additional obligations under Article 55 state that "the occupying State shall be regarded only as administrator and usufructory of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct."[315] Article **3** provides that a state that violates these provisions is "liable to pay compensation for all acts committed by persons forming part of its armed forces."[316]

The 1949 Geneva Conventions provide a means for enforcing these principles against individuals by including in the definition of grave breaches the "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."[317] Article **53** of the GC states that "any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary."[318]

In addition to customary international law, recent developments in the law of war have increased protection of the environment for parties to these conventions. The 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques prohibits parties from engaging in "military or any other hostile use of environmental modification techniques that cause widespread, long-lasting, or severe effects as a means of destruction, damage or injury to any other State Party."[319]

3131907 Hague Convention, *supra* note 9, art. **22.**

[314]*Id.* art. 23(g).

[315]*Id.* at. 55.

[316]*Id.* art. 3.

[317]GWS, *supra* note 66, art. 50; GWS (Sea), *supra* note 66, art. 51; GC, *supra* note 66, art. 147.

[318]GC, *supra* note 66, art. 53.

[319]Article I of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modivication Techniques, May, 18, 1977, 31 U.S.T. 333, 1108 U.N.T.S. 151 [hereinafter 1977 ENMOD Convention], *reprinted in* ROBERTS & **GUELFF,** *supra* note 9, at 379. The 1977 ENMOD Convention was ratified by the United States on January 17, 1980.

At the Conference of the Committee on Disarmament in Geneva, the committee sponsoring the negotiation of the 1977 ENMOD Convention adopted an understanding that broadly interpreted the terms "widespread," "long-lasting," and "severe" for purposes of the ENMOD Convention.[320] The term "environmental modification techniques" is defined as "any technique for changing—through the deliberate manipulation of natural processes—the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space."[321] This narrows the scope of the 1977 ENMOD Convention because very few weapon systems are capable of manipulating the environment and if they do, a state could argue that the intention was to destroy military objectives and not intended to manipulate the environment. Additionally, the terms "widespread, long-lasting, or severe" have been criticized as too broad or vague. In any event, the 1977 ENMOD Convention sets an upper limit on environmental damage and to the "extent that this flat prohibition is not exceeded, the 1977 ENMOD Convention recognizes the balancing of environmental damage with the customary principle of military necessity."[322]

The 1977 Geneva Protocol I also contains provisions expanding protection of the environment for state parties. Under Article 35(3), states are prohibited from "employ[ing] methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."[323] By including means and methods that "may be expected" to cause the

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[320]The Conference of the Committee on Disarmament interpreted these terms to mean:

> (a) "widespread": encompassing an area on the scale of several hundred square kilometres;
>
> (b) "long-lasting": lasting for a period of months, or approximately a season;
>
> (c) "severe": involving serious or significant disruption or harm to human life, natural and economic resources or other assets.

ROBERTS & GUELFF, *supra* note 9, at 377. Only one of these conditions is required for a violation. The understanding was specifically limited to the 1977 ENMOD Convention to avoid confusion in similar wording used in Article 35(3) of the 1977 Geneva Protocol I. Id. at 378.

[321]1977 ENMOD Convention, *supra* note 318, Article II. The Conference of the Committee on Disarmament adopted an understanding that included a list of occurrences that could be caused by these techniques. This list included, ***inter*** *alia:* "earthquakes; tsunamis; an upset in the ecological balance of a region; changes in weather patterns (clouds, precipitation, cyclones of various types, and tornadic storms); changes in climate patterns; changes in ocean currents; changes in the state of the ozone layer; and changes in the state of the ionosphere." ROBERTS & GUELFF, *supra* note 9, at 378.

[322]Sharp, *supra* note 309, at 21.

3231977 Protocol I, *supra* note 66, art. 35(3).

proscribed environmental damage, this convention has a broader application than the "deliberate manipulation" by "environmental modification techniques" of the 1977 ENMOD Convention. Unfortunately, the 1977 Protocol I does not define "widespread. long-term and severe damage," but by using the term "and," it requires all three conditions to be present for a violation of this provision. Article 55 of the 1977 Protocol I expands the protection of Article 35 and adds a prohibition on reprisals against the natural environment.[324] However, neither of these provisions proscribe battlefield damage incidental to warfare.[325]

The addition of the 1977 ENMOD Convention and the 1977 Geneva Protocol I to the body of law regulating the law of armed conflict has done little to provide a meaningful standard for including provisions concerning environmental damage in a cease-fire agreement. Protection of the environment during time of war remains an issue regulated by the customary international law principles of military necessity and proportionality.326 The inherent balancing of this regime makes it unsuitable for a simple determination that any environmental damage due to armed conflict creates liability. Accordingly, responsibility for environmental damage is an example of an issue that should not be settled in a cease-fire agreement.

Violations of the law of war protecting the environment carry criminal responsibility for the individuals committing the damage and state responsibility for violations committed by the members of its armed forces. The law does not provide a standard compatible for including environmental damage in a cease-fire agreement. Protection of the environment under the law of armed conflict requires a determination of whether the damage is justified by military necessity, and if not, who is responsible and what compensation is due. These issues can only be settled through negotiation or judicial determination.

As to the issue of state responsibility, the law provides a basis for including a provision like Resolution 686 in a cease-fire agree-

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[324] Article *55* provides:

> 1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby prejudice the health or survival of the population.
>
> **2.** Attacks against the natural environment by way of reprisals are prohibited.

[325] Terry, *supra* note **251,** at 64.

[326] *Id.* at 65.

ment. In Resolution 686, the United Nations Security Council demanded that Iraq "accept in principle its liability under international law for any loss, damage or injury arising in regard to Kuwait and third States, and their national and corporations, as a result of the invasion and illegal occupation of Kuwait.''This provision would include responsibility for unjustified and wanton destruction of the environment, but it preserves issues of whether certain damage can be attributed to military necessity, and if not, the extent of liability, If certain damage was incidental to combat operations and fell within the bounds of military necessity and proportionality, then under the law of armed conflict, Iraq would not be liable for that particular damage. Additionally, for environmental damage found to be wanton and not justified by military necessity, the amount of compensation remains an issue. These determinations cannot be made in a cease-fire agreement and must be preserved for political or judicial resolution.

As to criminal responsibility of individuals alleged to have committed environmental damage constituting a grave breach under the law of war, the law also requires that these individuals be given a fair trial.[327] A cease-fire agreement is not the proper forum for enforcement of international criminal law.[328]

V. Property

The return of property taken during the course of a war is not a subject normally included in cease-fire agreements. However, it is an issue that was included in the 1991 Gulf War cease-fire, and in the case of cultural property, there is a long history of specific protection and state practice that requires the return of this property at the conclusion of hostilities.[329] Timeliness is a concern. The earlier the parties take steps to provide for the return of the property, the more likely that they will be able to locate it and return it to the rightful owners.

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[327] *See* GC, *supra* note **66,** art. **146,** which requires that persons accused of committing grave breaches receive the safeguards of a proper trial and defense equal to that required under Article 105 of the GPW. Article **105** provides a number of minimum safeguards including the right to assistance and choice of counsel, the right to call witnesses, the right to be advised of the details of the charges and evidence against him in a language he understands, and the right to receive this information and counsel in time to prepare a defense. ***See*** GPW, *supra* note **66,** art. **105.**

[328] *See* Sharp, *supra* note 310, at **35-66** (providing a detailed analysis of potential criminal proceedings for violations of the law of war protecting the environment, their value as a deterrence, and advocating an international tribunal as the proper forum to hear the case of environmental damage from the 1991 Gulf War).

[329] Resolution **686,** paragraph 2(d) stated that: "Immediately begin to return all Kuwaiti property seized by Iraq, to be completed in the shortest possible period." U.N. Doc. S/RES/686 (1991).

A. Private Property

The 1907 Hague Regulations stated that "[plrivate property cannot be confiscated."[330] However, it may be requisitioned. Article **52** states:

> Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in operations of the war against their country.
>
> Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.
>
> Contributions in kind shall, as far as possible, be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.[331]

This does not protect state property, only municipal and private property. It also allows the army of occupation to requisition property according to its needs. Property requisitioned under this provision does not have to be returned, because this provision only requires restitution for the property taken. However, for:

> [a]ll appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.[332]

Protection for private property is not just a matter of ownership, it also is based on the type of property. Because this protection is variable and not all property is required to be returned, a provision mandating the return of all private property is too broad.

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[330] 1907 Hague Regulations, *supra* note 9, art. **46.**

[331] *See* id. art. 52.

[332] *Id.* art. **53.** FM 27-10, *supra* note 8, para. 409, in construing this article stated that "a receipt therefor should be given the owner or a record made of the nature and quantity of the property and the name of the owner or person in possession in order that restoration and compensation may be made at the conclusion of the war." Additionally, Article **54** protects submarine cables, requiring that they be "restored and compensation fixed when peace is made." **See** 1907 Hague Regulations, *supra* note 9, art. **46.**

B. Cultural Property

Cultural property always has received the greatest protection from the effects of war. The **1907** Hague Regulations safeguard public and private institutions dedicated to religion, charity, education, and the arts and science.[333] It also provides that the property of these institutions cannot be confiscated.[334] Additionally, these institutions, along with historic monuments and works of art and science, are protected against seizure, destruction, and wilful damage.[335] This provision also declares that a violation of its terms "should be made the subject of legal proceedings."[336]

This protection proved to be inadequate during the World War I and II and the international community responded with the **1954** Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and Regulations.[337] The conference also adopted a protocol that provides additional provisions on the export of cultural property from occupied territory, and the safeguarding and return of cultural property.[338]

Paragraph **3** of the 1954 Cultural Protocol provides:

> **3.** Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations.

This provision assumes a violation of paragraph **1** of the **1954**

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[333]1907 Hague Regulations, ***supra*** note 9, art. 56, provides the following:

> The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.
>
> All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

[334]Article 56 provides that the property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when state property, shall be treated as private property. *Id.* These regulations also provide: "Private property can not be confiscated." Id. art. 46.

[335]*Id.* art. 56.

[336]*Id.*

[337]Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict with annexed Regulations, May 14, 1954, 249 U.N.T.S. 240.

[338]Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 358 [hereinafter 1954 Cultural Protocol].

Cultural Protocol which bars the removal of cultural property from occupied territory.[339] It is important because it provides for the return of cultural property at the end of hostilities, not the end of occupation. This provision should not be interpreted to require occupation as a condition precedent to the duty to return the property and should apply to all situations where cultural property has been removed.

Paragraph 4 of the 1954 Cultural Protocol also requires parties, who fail to prevent the export of the cultural property from occupied territory, to pay an indemnity to the holders in good faith of property under paragraph 3.[340]

Additionally, the 1954 Cultural Protocol requires the return of property voluntarily removed for safekeeping:

> **5.** Cultural property coming from the territory of a High Contracting Party for the purpose of protecting such property against the dangers of an armed conflict, shall be returned by the latter, at the end of hostilities, to the competent authorities of the territory from which it came.[341]

This provision will not concern the cease-fire agreement, because it would likely involve a neutral party. The term "competent authorities" is not defined, and it is unclear whether this provision would require return to a government that had claimed sovereignty over territory taken by conquest.[342] However, a government should not benefit from any act that is illegal under international law.

All cease-fire agreements should contain a provision requiring the mandatory return of cultural property. It may take some time after the conclusion of the hostilities to determine whether any items have been removed, damaged, or destroyed. If the property is intact it must be returned. If damaged or destroyed, the responsible party must provide indemnity for the loss or damage suffered. Finally, cultural property cannot be retained as war reparations.[343]

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[339] *Id.* Paragraph 1 of the 1954 Cultural Protocol provides in part, "Each High Contracting Party undertakes to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property . . . ." *Id.*

[340] *Id.* para. **4.**

[341] *Id.* para. **5.**

[342] *See* HOWARD S. LEVIE, **THE CODE** OF INTERNATIONAL ARMED CONFLICT 936 (1986).

[343] 1954 Cultural Protocol, *supra* note 338, para. 3.

VI. Conclusion

Although the evolution of international law has expanded the scope of cease-fire agreements, their primary purpose remains that of ending hostilities. Where the law has provided a legal framework limiting the political discussion and the controversy that surrounds an issue, it should be resolved at the earliest possible moment by including it in the cease-fire agreement.

The determining criteria for most issues continues to be the ability of the parties to agree on provisions. If an issue of political significance in a particular conflict would cause delay in concluding the fighting, it should not be included in the cease-fire agreement. Issues concerning territory, state responsibility for war reparations and environmental damage, cooperation in the investigation and prosecution of war crimes, and disarmament remain politically charged issues that are not legally required to be included in the cease-fire agreement and are more appropriately resolved by the political representatives of the parties.

Modern cease-fire agreements must include humanitarian provisions along with the general terms of the cease-fire. An issue like the repatriation of POWs demonstrates the progression of the law from a topic of political consequence to an issue that is sufficiently defined by customary international law so that it can be included and settled by the military negotiators without delaying the peace process. The law in this area continues to evolve and existing duties—such as the obligation to remove landmines at the conclusion of hostilities—may be strengthened. Other topics, such as cooperation in the prosecution of war crimes, may develop to the point that they are no longer so controversial that they require substantial negotiation before the issue is included in a cease-fire agreement. Those political issues that are not settled at the time that the combatants decide to discontinue hostilities, must be resolved through negotiation and included in the peace treaty or final settlement to the conflict.

Cease-fire agreements must not be used to exact retribution or impose conditions that might lead to renewed hostilities. In the future, governments must ensure that cease-fire agreements include humanitarian terms that deal with the concerns of their war-torn societies in accordance with international law. It is in the best interest of these governments, the people they represent, and the world community, because a properly concluded cease-fire agreements will substantially increase the opportunity for lasting peace.

ASSAULT AT WEST POINT: THE COURT-MARTIAL OF JOHNSON WHITTAKER*

REVIEWED BY MAJOR LISA M. SCHENCK**

We cannot undo history. But today, finally, we can pay tribute to a great American and we can acknowledge a great injustice.[1]

Try never to injure another by word, by act,
or by look even. . . . Forgive as soon as you
*are injured, and forget as soon as you forgive.*2

On April 6, 1880, at the United States Military Academy, West Point, New York, Cadet Johnson Chestnut Whittaker, the only black cadet at West Point, missed the first formation of the day. Shortly thereafter, the cadet officer of the day found Whittaker laying on his side on the floor, bloodied and beaten, his arms and legs tied to the bed. In his book, Assault at West Point, John F. Marszalek chronicles Cadet Whittaker's personal struggles while at West Point, the attack, his court-martial for staging the assault, and his later successes in life. From a historian's view point, Marszalek tells a story of institutional racism and the failure of the military justice system.

The Whittaker case "was a sensation at the time, but had long since receded into history by the time Whittaker, who went on to be a South Carolina college professor, died in 1931."[3] John Marszalek, a Mississippi State University professor, after discovering a reference to Whittaker's case while researching a book on General William T. Sherman, brought this episode back to the surface.4

Marszalek originally wrote and published *Assault at West Point* in 1972, and then re-released this work in 1994, accompanied by a movie. Finally, over twenty years after its original publication,

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*JOHN F. MARSZALEK, ASSAULT AT WEST POINT: THE COURT-MARTIAL OF JOHNSON WHITTAKER (New York: Macmillian Publishing, Co., 1994);330 pages, $12.00 (softcover).

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[1]President William Clinton, Remarks at Johnson Chestnut Whittaker Commissioning (July 24, 1995).

[2]Id. (quoting an inscription that Johnson C. Whittaker wrote on the inside cover of his Bible while at West Point).

[3]John F. Hariss, The Late Lieutenant; Black Cadet Finally Gets Commission Denied in 1880, WASH. POST, July 25, 1995, at E.

[4]Id.

this work has raised public attention and caused a historical injustice to be corrected. After reading John Marszalek's historical record, *Assault at West Point,* it seems incredible that such an injustice could have occurred. However, President Clinton's recent posthumous commissioning of Johnson C. Whittaker, only reinforces the author's major premise—that, in 1880, *an injustice did occur.*

From cover to cover, *Assault at West Point* provides a vivid description of the difficulties that Cadet Whittaker suffered as a member of society in general and as a black cadet. The author painstakingly describes Whittaker's transition from a slave at birth in 1858 on a South Carolina plantation to a black cadet at the Academy. As a child, Whittaker helped his mother raise her three sons when his father abandoned their family on the day that he and his twin brother were born. With this introduction, Marszalek leads the reader through Whittaker's suffering and convincingly depicts a man of extraordinary inner strength who could not commit such an offense.

At the outset, the author begins persuading the reader that Johnson Whittaker was a victim of institutional racism. Marszalek effectively highlights the political and social atmosphere in the United States in 1876 when Whittaker entered the Academy. Although blacks had begun attending West Point in 1870, by 1889 only three of the twenty-two admitted had graduated. As a black cadet at the Academy, Whittaker suffered insults and ostracism. The author describes Whittaker as academically, militarily, and socially isolated. His first-year roommate, Henry **O.** Flipper, a senior, became the first black Academy graduate. After Flipper graduated, Whittaker remained the only black cadet.

The author captures the reader's sympathy with his graphic description of Cadet Whittaker's life at West Point. The white cadets, prejudiced from their upbringing, ignored Whittaker. He lived, studied, ate, and played alone. Except when official duties required, no one talked to him. The other cadets would not stand near him in formation nor sit by him in the mess hall. Cadet Whittaker's Bible and religion were his only companions. Shy, lonely, and religious, Whittaker attempted to concentrate on his studies, avoid confrontation, and graduate.

A physically vulnerable individual, at eighteen years old, Whittaker was small and thin, weighing 110 pounds and standing five feet, eight inches tall. During Cadet Whittaker's first year, a cadet from Alabama struck him—the Academy later court- martialed and suspended the Alabama cadet. According to Marszalek, because Whittaker did not fight back, the cadets labeled him a coward.

Marszalek unsuccessfully attempts to persuade the reader

that Whittaker was academically average. However, his academic record indicates otherwise, and Whittaker struggled with his studies. During his first year, Whittaker was at the bottom of his class. Although Whittaker successfully completed his second year, during his third year, he failed an exam and faced dismissal. Because he was the only black cadet at the Academy and was hardworking, Major General John M. Schofield, the Superintendent, allowed Whittaker to repeat his junior year.

The assault occurred while Whittaker was repeating his third year. On April 5, 1880, the day before the assault, Cadet Whittaker received a handwritten note stating, "Mr. Whittaker, You will be fixed. Better keep awake. A friend." Early the next morning, a cadet found Whittaker on the floor in his underwear, his ankles tied together with cadet belting and then tied to the bedrail. Wrists together, his arms were bound in front of him. Blood covered his face, neck, ears, foot, and his pillow; blood was splattered on the mattress, floor, wall, blanket, and comforter. The blood came from his slashed ear, a smaller cut above that, parallel slashes on one of his toes, a scraped hand, and a bloody nose. On the floor around Whittaker, they found a blood spotted club, burnt Bible pages, clumps of hair, scissors, a hand mirror, a bloody handkerchief, and a pocket knife.

Despite this bloody scene, the Academy staff immediately believed Whittaker was faking. After a five-minute examination, the attending physician, concluding he was faking, interrogated the battered, bloody cadet. Whittaker claimed that at 2 A.M. he heard a noise and then three masked men entered his room. While threatening him not to speak, they grabbed his throat, struck him on the temple, and gave him a bloody nose. Forcing him to the floor. one suggested shaving his head; another wanted to mark him like a "hog." They slashed his ear lobes and cut his hand when he defended himself. They cut chunks of hair from his head, and tied him up. They forced him to look at himself in the mirror and struck him in the forehead with it, breaking the glass. Before leaving, they warned Whittaker that if he cried out or told anyone, he was "a dead man." Afraid that they would return, and doubting any other cadet would come to help him, Whittaker lay terrified, lapsing into unconsciousness until morning.

Marszalek accurately infers that Whittaker would have been free from suspicion had the institution been free of racism. The author also indicates that although Whittaker was truthful, without the staff's support he could not get anyone to believe him. The findings of the initial investigation appear to result from prejudice. The Commandant of Cadets began investigating and within two hours of

finding Whittaker, ordered the cadets to return the room to order and wash all the bloody clothes. In his investigative report, he accused Cadet Whittaker of "writing the warning note, mutilating himself, and faking unconsciousness." He recommended that the Academy give Cadet Whittaker the option to either resign, request a court of inquiry, or request a court-marital. Offered these options, Cadet Whittaker, offended, requested a court of inquiry.

Throughout this case chronology, Marszalek focuses on political interest and command pressure and their influence. The facts support his premise that command pressure triumphed over public and political interests. The President, Congress, the public, and the press focused on this political story and the treatment of black cadets at the Academy. United States Senators and Representatives raised resolutions to order the Secretary of War to provide all information about the case, but were defeated. Because of the public interest, the Superintendent became overly involved. Before the court even convened, Major General Schofield assured the public, during press interviews, that even though the court would decide the issue, he was certain that the Academy cadets did not commit the assault. During the interviews, Major General Schofield gave the impression that Whittaker was the perpetrator who committed the assault in an attempt to avoid an exam.

With this "neutral and detached'' guidance, the court of inquiry (comprised of three Academy faculty members—a major, captain, and first lieutenant) began hearing evidence. Although not an attorney, the author accurately describes flaws in the defense strategy. For example, as requested by Whittaker's representative (also a faculty member), Whittaker was not present for the hearings. Therefore, he could not assist in his own defense and could not identify problems in the government's demonstration of how Whittaker could have untied himself that night. The defense also waived all cross-examination. Furthermore, the court decided that Cadet Whittaker was a liar after the government contradicted Whittaker's testimony that he was fairly treated at the Academy by producing his letters in which he described the prejudice that he had felt.

Marszalek also indicates that both the command and the court left other theories about the offense unexplored. He addresses additional potential theories and presents supporting evidence. The author implies that the Academy did not explore the other theories because of command influence on the court. For example, both sides presented evidence that three cadets, while at a local tavern, had discussed committing the assault. Several civilians and cadets testified, but denied all knowledge of such information. The author portrays the Superintendent, Major General Schofield, as the catalyst

for the cover up. The Superintendent lifted cadet restrictions and in an "impartial" order thanked his cadets for enduring extensive questioning of their honesty. Major General Schofield, present during court sessions, talked to the court during recesses.

On May 28, 1880, in closing, the recorder told the court that the cadets had unquestionable veracity, no motive, and could have easily used demerits to get rid of Whittaker. Without explaining Whittaker's motive, he focused on inconsistencies, Whittaker's poor academic standing, fear of not graduating, and fear of an approaching exam. The recorder made flagrant racially prejudicial comments indicating that slavery was full of self-inflicted injury and blacks were intellectually inferior. Questioning his failure to call for help or untie himself, the court found that Whittaker's wounds were self-inflicted.

While awaiting the Secretary of War's action on the court of inquiry report, Cadet Whittaker failed an oral philosophy examination. Ensuring court-martial jurisdiction, Major General Schofield suspended Whittaker. After reviewing the record, The Judge Advocate General, W.M. Dunn, found that Whittaker had devised the scheme, perjured himself, and continued to lie in "vain hope of escaping the consequences of his stupid and criminal act." Although a court-martial would convict Whittaker, it probably would not uncover new evidence; therefore, Dunn recommended, that they should merely discharge Whittaker for deficiency.

However, public attention remained a concern. With the publicity of ostracism of black cadets at West Point, critics called for Schofield's replacement. As a result, President Hayes became the deciding authority for Whittaker's future. Whittaker wrote to President Hayes demanding a court-martial or a service appointment. His supporters also petitioned the President. In response, President Hayes convened a court-marital. Six of the ten members were not West Point graduates, including the panel president, a brigadier general. (The day after the trial began, January **21,** 1881, Major General Schofield relinquished command of West Point.)

Although Cadet Whittaker's defense team was highly qualified, the author creates a feeling that it was too late for them to succeed. Whittaker's defense counsel was the extremely qualified Daniel H. Chamberlain, a Yale valedictorian, Harvard Law School graduate, and former governor of South Carolina. His assistant counsel was Richard T. Greener, a South Carolina professor and Harvard's first black graduate.

The first charge against Cadet Whittaker alleged conduct

unbecoming an officer and gentlemen. It further alleged that he deceived superiors and the public into believing that he was a victim of a conspiracy. They also charged him with lying to the court of inquiry, which was conduct prejudicial to good order and discipline.

The author examined the trial and its prejudices. Without exposing new evidence, the trial became a battle of the handwriting experts and doctors. The author depicts the trial as the final expression, the ***coup de grace,*** of institutional racism. Clearly raising and relying on the race issue, in closing the trial counsel reminded the panel that blacks were "known for their ability to sham and feign" and "play possum." While recommending that the convening authority remit the fine and confinement, the panel found Whittaker guilty of the charges and sentenced him to a dishonorable discharge, a one-dollar fine, and one year of confinement.

Reviewing the record, The Judge Advocate General, D.G. Swaim, reported that because the President never had authority to convene the court-martial, the trial was void. Furthermore, the government failed to prove beyond a reasonable doubt that Cadet Whittaker tied (or could have tied) himself up or that he wrote the warning note. Additionally, "the handwriting evidence had been improperly introduced, but, in any case, did not prove Whittaker's authorship.,' Based on these findings, President Chester A. Arthur disapproved the court-martial findings and sentence. That same day, March 22, 1882, Secretary of War Robert **T.** Lincoln, son of President Lincoln—"the Great Emancipator," administratively discharged Whittaker from West Point for failing his June 1880 exam.

Near the end of his book, Marszalek continues his theory that a man with this moral fiber would not commit such an offense. He uses Whittaker's numerous successes in life as support— that Whittaker was admitted to the South Carolina bar in 1885, adds credence to this theory. Moreover, until his death in 1931, Whittaker practiced law, became a school principal, and taught college psychology and education.

Whittaker rarely spoke of his West Point experience. Nevertheless, his two sons became commissioned officers and served in World War I. His grandson served in World War II, as one of the first black fighter pilots, and subsequently became an attorney. A great-grandson became a Harvard Law School graduate and was commissioned in the Army. Additionally, in July 1995, President Clinton approved South Carolina Senator Ernest F. Hollings's legislation and posthumously commissioned Cadet Whittaker.

This book truly reflects history; and unfortunately, by its conclusion, the case is not resolved. Whether Cadet Whittaker staged this incident or the Academy staff assaulted him using their method of justice, remains unanswered. In any case, this book is well-written, insightful, educational, and unsettling. John Marszalek bases his theories on evidence that he discovered directly from the National Archives. He supports his work with pictures of Whittaker, the note, the crime scene, maps, and other photographs. He also includes relevant excerpts of notes and transcripts to persuade the reader of Whittaker's innocence.

Marszalek presents an accurate, detailed portrayal of a man of courage. While pointing out numerous discrepancies and prejudices, he carefully guides the reader through the legal proceedings of this extremely engrossing case. Although written for the lay person, judge advocates will be amazed at the myriad of legal issues including, command influence, destruction of evidence, admissibility of incredible evidence, and absence of panel members during trial.

Johnson C. Whittaker's recent posthumous commissioning adds to the theory that a tragic injustice occurred in the 1880s. Whittaker's case is an injustice that only took one century to "acknowledge." Reading Marszalek's record of this injustice will open the eyes of many judge advocates, as well as others who believe that the Army overcame racial prejudice in 1870 with the admission of black cadets to West Point. Through the author's twenty-year effort, Whittaker finally received his military commission, and as Marszalek said, "it is justice delayed, but it is justice done."[5]

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[5]Id.

A GOVERNMENT OF OUR OWN*

REVIEWED BY LIEUTENANT COLONEL H. WAYNE ELLIOTT
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The Confederate States of America had a life span of just over four years, virtually all of which was spent fighting the most destructive war of the century. It fielded highly motivated, competent armies, officered by some of the best commanders in American military history. Almost every school child knows that the shooting war started at Fort Sumter, South Carolina, in April 1861 and generally ended at Appomattox, Virginia, in April 1865. But few people know much about the origins of the Confederate government or about the machinery by which it attempted to exercise authority and control — sovereignty – over its territory, its people, and its military forces.

There is a natural tendency to focus on the war's military exploits and the glories of the battlefield. There is an intrigue that battle brings to literature, a fascination with death, destruction, victory, and defeat. Unfortunately, this natural tendency has served to push the civil administration of the Confederacy to the footnotes of history. Now, in *A Government of Our Own*, those interested in the history of the War Between the States have a highly informative and well-written account of the formation of the Confederate government. The author, William C. Davis, has written twenty-five books on the Civil War and is familiar to many as a commentator on the television series, Civil War Journal.

Governments are established by people. The scheme of government reflects the shared experiences of those people. In 1861, the common American experience with government was with the United States Constitution and the federal form of government. The need to develop a constitution for the new Confederacy provided an opportunity for a "review session" to determine just how well the United States Constitution had actually worked for its first seventy years. Thus, the Confederate Constitution gives today's Constitutional lawyer or legal historian some indication of how successful the United States Constitution was considered to have been

*WILLIAM C. DAVIS, A GOVERNMENT OF OUR OWN (New York: The Free Press, 1994); 550 pages, $27.95 (hardcover).

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up to that time. This book, therefore, is not only for the "Civil War buff," but also is an excellent tool for the modern Constitutional law scholar.

The book covers four months in early 1861, during which a new nation was born. As each Southern state seceded, it became, at least in its own eyes, a sovereign and independent nation state. Yet, of course, these small nations were doomed to failure. Thus, when South Carolina seceded, it immediately suggested that, as other states followed its lead, the newly independent countries would meet to forge a new union or confederation. Forty-three delegates, including thirty-three lawyers, from the seven states that had seceded convened in Montgomery, Alabama, on February 1861 to develop the new nation's constitution and create a government. The group declared itself to be a Provisional Congress, empowered by the respective states to draft a charter for the new national government which would succeed the United States government in the South. Faced with the need to quickly create and staff a government, it was only natural that the United States Constitution would serve as the model. In their view, there was little wrong with the United States Constitution. What was wrong was the way that it had been interpreted or, as they saw it, misinterpreted. To minimize problems with future misinformed interpretations, the language of the new constitution would be tightened. The aim was to resuscitate the original Constitution, not repudiate it. Some delegates even supported calling the new nation by the same name as the old, the "United States." This was rejected and finally it was agreed that the new nation would be the "Confederate States.''

The new document's Preamble made it clear that the government was, like the old, created by the people, but only through "each State acting in its sovereign and independent character." This change in the Preamble was intended to make clear that the new government was a union of independent states, not a union of the people in those states. This change, placed in a position of prominence, served as a definitive statement of the philosophy of the new Confederacy—real political power was to be in the states, not in the central government. In another change, the Preamble, reflective of the more pious nature of society in the 1860s than in the 1780s, invoked the "favor of an Almighty God" on the new nation.

In the first Article, legislative powers were "delegated," not "granted" to the central government's Congress. The word "delegated" implies a less absolute transfer of power than does the word "granted." To avoid the controversy over the meaning of the United States Constitution's House apportionment formula ("three-fifths of

all other persons"[1]), the Confederate Constitution deleted the vague phraseology and simply referred to "three-fifths of all slaves."

To avoid the influence of what were seen as increasingly divisive partisan politics, the President of the Confederacy would be elected for a single six-year term and would not be eligible for reelection. Though the electoral college system was not particularly well regarded, the drafters of the Confederate Constitution could not agree on any workable substitute. The electoral college remained. The President was permitted a line item veto over any particular appropriation in a spending bill. The Confederate Constitution required that the Post Office be self sufficient by March **1863.**

Unlike the United States Constitution which prohibited congressional action to ban the African slave trade before 1808,[2] the Confederate Constitution specifically prohibited the African slave trade. Yet, the Confederate Constitution also prohibited the passage of any law which might impair the "right of property in negro slaves." To facilitate cooperation between the executive and legislative branches, the Confederate Constitution provided that Congress could authorize Cabinet heads to sit in Congress and participate in the floor debates. Amending the Confederate Constitution was made easier. Three states could call for a Constitutional Convention and then any amendment adopted by the Convention needed to be ratified by only two-thirds of the states to become law. Congress could not initiate an amendment.

There was much debate about the need for any changes at all to the old document and much controversy over how to word such changes. While the debate continued, a temporary constitution and government were created. Jefferson Davis of Mississippi, hero of the Mexican War, a former Secretary of War and United States Senator, was unanimously elected President. Alexander Stephens of Georgia was chosen as Vice-president. When Davis arrived in Montgomery, Alabama, he immediately began organizing a government. Echoing his new Vice-president, he stated the new nation's objective, "All we ask is to be let alone." Yet, he knew that the new government had to prepare for war. To create a national Army was a monumental task. Each state had maintained its own militia with its own officers. The integration of officers of the new Confederate Army with the militia officers appointed by state governors would be a continuing concern for the new President. The main problem was establishing relative dates of rank for officers of the old United

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[1]U.S. CONST. art. I, §2, **cl. 3.**

[2]*Id.* art. I, §9, **cl. 1.**

States Army and those militia officers who had been appointed by state governors. (In Confederate legislation adopted in May 1861, Robert E. Lee was ranked third in the Confederate Army after the Adjutant General, General Samuel Cooper, and General Albert Sidney Johnston, who would later be killed at Shiloh.) The newly created War Department formally adopted the Articles of War of the United States Army and ordered copies distributed to the new officers. Defense contractors flooded Montgomery, Alabama, with proposals for new weapons, including a design for an airship which the developer claimed could go one hundred miles per hour.

For the lawyer and the soldier alike, this book provides an illuminating picture of the trials and tribulations involved in creating a government and a military establishment. Many of the most prominent politicians of the old government were present in Montgomery to do their part in creating the new government. Most saw themselves as the nineteenth century equivalent of the original founding fathers. Throughout the process there was a reverence for the past and, at the same time, a disdain for any future formal relationship with the "wayward" states of the North.

Virginia left the Union when Lincoln called for volunteers in response to the firing on Fort Sumter. With Virginia now part of the new Confederacy, the decision was made to move the capital from Montgomery to Richmond. For four years the government of the Confederacy operated from Richmond, Virginia, and the Union armies' rallying cry was "On to Richmond." That the fragile new government was able to survive and function in the midst of an unrelenting war is a testament to the efficiency and organizational ability, not only of those who established and staffed that government, but to the model on which they relied.

Because the Confederacy was almost immediately plunged into war, much of the Confederate Constitution was never fully implemented. The Confederacy never got around to actually creating a federal judicial structure. As a result, there are no Confederate court opinions dealing with major interpretive issues of the Confederate Constitution. On the other hand, because the Confederacy was at war, the shared goal of the President and the Congress—to be let alone—minimized many constitutional questions. Although there often was acrimonious debate between President Davis and members of Congress, most of it turned on the best way to prosecute the war, not basic questions of constitutional prerogatives. However, at the same time, the relationship between the President and some of the state governors was marked by contentiousness and continual wrangling over the constitutional power of the government in Richmond to mandate action by the states.

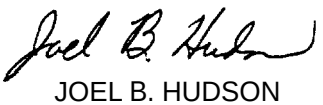
What is most interesting for the lawyer who examines the Confederate Constitution today is how relevant parts of it are for modern America. For example, there is renewed interest in formally giving the President a line item veto. At the same time there are those who argue that the Constitution already gives the President such power. However, because the Confederate Constitution deviated from the old and specifically granted the line item veto to the President, this would seem to refute an argument that such power was intended by the drafters of the United States Constitution. Had the President of the United States been considered to have such power, there would have been no reason to write that specific provision into the Confederate Constitution. Additionally, every four years the electoral college system comes under attack. But, when given a chance to change that system, the Confederate Constitution's drafters could not agree on an alternative. In short, because the Confederate Constitution reflects the opinions of its drafters as to what was good and bad about the original Constitution, it is a document worth study. Where a provision was unchanged from the original, it was considered to be working as intended. Where a provision was changed, it was considered to be defective and in need of improvement.

William C. Davis has again written an excellent book on an important aspect of the war which most assuredly is the defining event in American history. The book is well researched and well documented. Fear, bravado, turmoil, and intrigue permeated the Montgomery Convention. Because much of the legislative debates in Montgomery were conducted in secret session, there are few readily available sources of information about what happened there. Davis has supplemented those few sources with personal diaries and contemporaneous newspaper accounts. The result is a historical study which reads like a novel. This book should be included in every Civil War library. It also ought to be part of the literary repertoire of every Constitutional scholar.

By Order of the Secretary of the Army:

DENNIS J. REIMER
General, United States Army
Chief of Staff

Official:



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